LAW AND CONTEMPORARY PROBLEMS

THE FEDERAL EMPLOYERS' LIABILITY ACT

PART I

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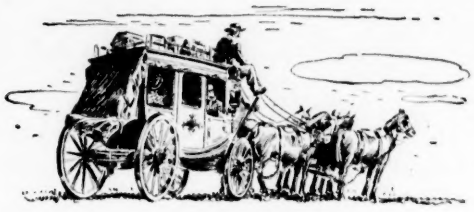

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LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

This symposium,[1] though centered primarily on the Federal Employers' Liability Act,[2] of necessity undertakes a reevaluation of other systems of compensating employees for work-connected injuries, since any discussion of the alleged merits and defects of the FELA inevitably includes a comparison of it with alternative methods of dealing with work-injury compensation.

The FELA is still based essentially on the doctrines of the common law tort of negligence, although some of those doctrines, especially those peculiar to master and servant, have been modified or even abolished by Congress and the courts. Recovery depends both upon the employer-employee relationship and upon fault or negligence on the part of the employer; fault on the part of the employee is a partial defense, even though not an absolute bar; enforcement is entirely through the adversary system and the courts; damages are given not only for the loss of the injured person's earning capacity through disability, but also for all other harms which the law of torts now deems compensable, such as pain and suffering, disfigurement, and impotency; and the amount of compensation recoverable attempts to restore, so far as money can, all the injured worker has lost in order to make him whole.

The most readily available alternative to the FELA is workmen's compensation, either a unified federal law for all employees now under the FELA, or congressional permission for each state to include such of these employees as are appropriate under the present workmen's compensation system of that state. Workmen's compensation systems vary widely in detail but all are based primarily on one essential fact, namely, liability results not because of any fault, tort, or negligence of the employer but simply from the necessary connection or relationship between the employee's injury and his job; liability is usually enforced through an administrative procedure subject to judicial review; compensation is given only for loss of earning power resulting from disability and only in such a minimum amount as will permit the injured worker to exist without being a burden upon others.

Another possibility would be to substitute for the FELA a system similar to that

[1] Published in two parts, the second of which will appear in July, 1953.

[2] The title of the Act is a misnomer; actually it applies only, in general, to those employees of railroads who are injured while working in interstate commerce.

in Great Britain. This gives to the entire population, in varying degrees, broad social insurance against many of the hazards of life, such as unemployment, old age, and all illness, injury, and even death, whether or not resulting from employment. Such a proposal might be financed by the state alone through general taxes, or by joint contributions from the state and from either or both the employer and the employee, with the contributions being uniform for all employers (workmen's compensation, by contrast, is financed initially solely by the employer as a rule, but ultimately, of course, is paid for by the consumer of the employer's products); the benefits of such a scheme are usually uniform for all recipients regardless of prior earnings or even, to a large extent, actual means or needs.

The three methods, of course, might well be combined in various ways. Recovery for work injuries caused by an employer's negligence might be permitted in lieu of or in addition to, at least in part, workmen's compensation or general social insurance payments. By statute, judicial decision, presumptions, allocation of burden of proof, or jury verdicts, the element of fault may largely be strained out of the so-called negligence required for recovery under the FELA. Federal retirement, or unemployment, or social security benefits may be paid to FELA-covered employees so that even in the absence of any workmen's compensation or specific insurance against work injuries, an employee suffering a work injury, where unable to recover under the FELA for lack of proof of negligence, will still not in effect be denied all compensation. Similarly, employers even where not liable under the FELA because of the absence of negligence, may follow a policy of paying some compensation at least for all work injuries as a result of their relations with either their employees or labor organizations.

One of the most disturbing aspects of this situation certainly is the increasing criticism, much of it well documented, of many aspects of state workmen's compensation laws. In an increasingly large number of states, workmen's compensation suffers from inadequate coverage of employees; from compensation and benefits far too low (even for minimum standards of living, in the present time of inflation); from excessive, costly, and time-consuming litigation before both administrators and courts; from little if any injury-preventive measures; from the absence of suitable, over-all rehabilitation programs; and from excessive costs to employers and employees alike (as compared with those under the FELA), caused by poor methods of disability ratings and inadequate controls over the methods, profits, underwriting expenses, and claims-adjustment allowances of insurers. Such systems obviously are neither quick, automatic, nor adequate in their awards, and so long as such defects exist there seems little chance for substituting workmen's compensation for the FELA—far more likely would be the substitution of a comprehensive, over-all social security insurance program.

These defects in many state workmen's compensation systems, however, should not, I believe, blind us to the possible advantages that a suitable workmen's compensation law, state or federal, might have—advantages over both the FELA and a

broad social security system. Employer and private-insurer liability, with resulting resistance in many cases to payment of compensation claims, may or may not cause increased litigation as compared with a system of state payments for all injuries, but it would certainly seem to be an excellent device to eliminate unfair, fake, or malingering claims for work injuries.

Two points, perhaps, may be overlooked and deserve more emphasis than they sometimes receive. First, prevention is clearly the most desirable objective in coping with work injuries and we know all too little about the possible effects of the various methods of compensation for work injuries on the success of preventive measures by employers, employees, insurers, labor organizations, and government officials. Second, full and speedy rehabilitation and restoration of the injured worker as far as possible, in his home, job, and community, by employer, insurer, or government, seems a more desirable goal than the mere payment of money to the injured person after the occurrence of the injury.

ROBERT KRAMER.

WHAT THE NEW SUPREME COURT HAS DONE TO THE OLD LAW OF NEGLIGENCE

SIDNEY S. ALDERMAN*

In 1940, General Charles De Gaulle, in his declaration from London, made famous in history his ringing statement that "France has lost a battle; she has not lost the war." Contemporaneously, President Franklin D. Roosevelt was steadily winning a war, the first battle of which he had lost when the Senate of the United States, in July, 1937, in expression of an aroused public sentiment for the preservation of an independent judiciary, soundly defeated his famous court-packing plan. But, between June, 1937, and January, 1943, as the result of deaths and retirements among the "nine old men"[1] on the "old Supreme Court," President Roosevelt had the opportunity to, and did, substantially reconstitute the Court, by appointing to it eight new Associate Justices,[2] all Democrats and supporters of his "New Deal."

Justice Harlan Fiske Stone, promoted by President Roosevelt to the office of Chief Justice, was a Republican, originally appointed to the Court by President Coolidge, but he was greatly admired by President Roosevelt. In his "fireside chat" of March 9, 1937,[3] and in the testimony by his Attorney General, Homer S. Cum-

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[1] The disrespectful title of a then current book by Drew Pearson and Robert Allen.

[2] The following were his appointments of new Associate Justices, with indication of the vacancy filled, date of nomination, and date seated on the Court:

(1) Senator Hugo L. Black, of Alabama, in the place of Mr. Justice Willis Van Devanter, retired; nominated August 12, 1937, seated October 4, 1937 (302 U. S. iii (1937)).

(2) Solicitor General Stanley Reed, in the place of Mr. Justice George Sutherland, retired; nominated January 15, 1938, seated January 31, 1938 (303 U. S. iv (1938)).

(3) Professor Felix Frankfurter, of Harvard Law School, in the place of Mr. Justice Benjamin N. Cardozo, deceased; nominated January 5, 1939, seated January 30, 1939 (306 U. S. iii (1939)).

(4) Mr. William O. Douglas, Chairman of the Securities and Exchange Commission and former professor of law in Columbia University Law School, in the place of Mr. Justice Louis D. Brandeis, retired; nominated March 20, 1939, seated April 17, 1939 (306 U. S. iii (1939)).

(5) Attorney General Frank Murphy, of Michigan, in the place of Mr. Justice Pierce Butler, deceased; nominated January 4, 1940, seated February 5, 1940 (309 U. S. iii (1940)).

(6) Senator James F. Byrnes, of South Carolina, in the place of Mr. Justice James Clark McReynolds, retired; nominated June 12, 1941, seated October 6, 1941 (314 U. S. iv (1941)).

(7) Attorney General Robert H. Jackson, of New York, in place of Associate Justice Harlan Fiske Stone, promoted to Chief Justice; nominated June 12, 1941, seated October 6, 1941 (314 U. S. iv (1941)).

(8) Honorable Wiley Rutledge, of Iowa, Associate Justice of the United States Court of Appeals for the District of Columbia, in the place of Associate Justice James F. Byrnes, resigned; nominated January 11, 1943, seated February 15, 1943 (318 U. S. iii (1943)).

[3] *Fireside Chat on Reorganization of the Judiciary*, in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (1937—THE CONSTITUTION PREVAILS) 129 (Rosenman ed. 1941).

mings, on the next day, March 10, 1937,[4] the President assured the nation that by his court-packing plan he did not seek the power to appoint justices subservient to him but that he sought only the power to appoint justices fit to sit beside members of the Court who understood modern conditions and who would "think like" Justices Brandeis, Stone, and Cardozo.

On April 12, 1945, Franklin D. Roosevelt died and Vice President Harry S. Truman, former Democratic Senator from Missouri, became President. He engrafted his "Fair Deal" on his predecessor's "New Deal" and has always boasted that he has followed his predecessor's policies. However, he appointed to the Court, as Associate Justice, Senator Harold H. Burton, of Ohio, the first Republican to be named to the Court since the appointment of Chief Justice Hughes by President Hoover in 1930. Mr. Justice Burton was seated October 1, 1945. President Truman also appointed a Democrat as Chief Justice and two Democrats as Associate Justices, all stalwart supporters of the New Deal and of the Fair Deal.[5]

Thus Presidents Roosevelt and Truman, since August, 1937, had made a clean sweep of the old Court and several changes on the new Court. Out of a total of eleven Associate Justices appointed to the Court, only one, Mr. Justice Burton, had been a Republican. One Republican and one Democrat had been appointed Chief Justice.

Fortunately for this country, although a court can be packed with his partisans by a Chief Executive, he cannot keep it packed as a partisan tribunal. He cannot control the decisions of his appointees after they take their oaths as judges and take their seats on an independent Court. Men of intelligence and character, however partisan they may have been politically, when they are appointed to an independent judiciary, became their own masters, do their own thinking, and wrestle with their own consciences, not with the will of the appointing power.

The outstanding example of this was Mr. Justice Holmes. President Theodore Roosevelt appointed him to the Supreme Court for the very purpose of getting one more vote for the Government and hence of controlling decision in the *Northern Securities* case. The idea that court decisions could be controlled by court appointments seems to have run in the Roosevelt family. It was no patented, exclusive property of the Democratic branch of that family. But, much to Theodore Roose-

[4] *Hearings before the Senate Committee on the Judiciary on S. 1392 (A Bill to Reorganize the Judicial Branch of the Government)*, 75th Cong., 1st Sess. 16, 32 (1937).

[5] President Truman's appointments were as follows:

(1) Senator Harold H. Burton, of Ohio, in the place of Associate Justice Owen J. Roberts, resigned; nominated September 18, 1945, seated October 1, 1945 (326 U. S. iv (1945)).

(2) Honorable Fred M. Vinson, of Kentucky, Secretary of the Treasury, former Democratic Congressman, Associate Justice of the United States Court of Appeals for the District of Columbia, appointed Chief Justice in the place of Chief Justice Stone, deceased; nominated June 6, 1946, seated June 24, 1946 (329 U. S. iii (1946)).

(3) Honorable Tom C. Clark, of Texas, Attorney General, in the place of Associate Justice Frank Murphy, deceased; nominated August 2, 1949, seated October 3, 1949 (338 U. S. iv (1949)).

(4) Honorable Sherman Minton, of Indiana, Judge of the United States Court of Appeals for the Seventh Circuit, in the place of Mr. Justice Wiley Rutledge, deceased; nominated September 15, 1949, seated October 12, 1949 (338 U. S. iv (1949)).

velt's chagrin, his special appointee, Mr. Justice Holmes, dissented from the holding, by a bare majority of the Court, in favor of the government in the *Northern Securities* case[6] and it was in that dissent that he made one of his most famous statements:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

In one of his famous letters to his friend Sir Frederick Pollock, that of February 9, 1921,[7] Mr. Justice Holmes discussed this incident with complete frankness. He said:

> A good letter from you, just after reading *Theodore Roosevelt & His Time*, a class of work that I eschew. Of course I pretty well made up my package about him a good while ago, and I don't think I was too much disturbed by what you admit to and what was formulated by a Senator in his day, thus: "What the boys like about Roosevelt is that he doesn't care a damn for the law." It broke up our incipient friendship, however, as he looked on my dissent to the *Northern Securities case* as a political departure (or, I suspect, more truly, couldn't forgive anyone who stood in his way). We talked freely later but it never was the same after that, and if he had not been restrained by his friends, I am told that he would have made a fool of himself and would have excluded me from the White House—and as in his case about the law, so in mine about that, I never cared a damn whether I went there or not. He was very likeable, a big figure, a rather ordinary intellect with extraordinary gifts, a shrewd and I think pretty unscrupulous politician. He played all his cards—if not more. *R. i. p.*

On the bench, Holmes wore no man's collar. He bowed to no "hydraulic pressure" of "immediate overwhelming interest." He wrestled with no angel but his own judicial conscience.

Nevertheless, men remain human beings after they don judicial robes. Human beings cannot completely divorce themselves from their previous training, environment, activities, and sympathies, or from what Chief Justice Stone called their "previous economic predilections." While neither President Roosevelt nor President Truman could have controlled, if either had wanted to, any particular decision of any one of his appointees to the Court, all the world knows that the new Court, as reconstituted after 1937, has substantially revolutionized and rewritten large parts of the law of the land, from constitutional law to venue, if not from admiralty to zoning. It has overruled precedents of seventy-five years' standing. Whether this has been a good or a bad revolution, history will judge. It would take a treatise of several volumes to describe the changes in the law by the decisions in this period.

[6] Northern Securities Co. v. United States, 193 U. S. 197, 400-401 (1904).
[7] See II HOLMES-POLLOCK LETTERS 63-64 (1941).

A pertinent comment on this revolution in the law by the new Supreme Court has just come from the pen of Mr. Justice Jackson, as this paper goes to press, in his separate opinion in *Brown v. Allen*, decided February 9, 1953, in which he said (73 Sup. Ct. 397, 424):

> Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.

Again, in the same opinion, Mr. Justice Jackson said (*id.* at 427):

> There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Finally, in the same opinion, he said (*id.* at 430):

> But I know of no way that we can have equal justice under law except we have some law.

It is the limited purpose of this paper to show what the newly constituted Supreme Court of the United States, in the decade since 1942, by its decisions under the Federal Employers' Liability Act,[8] has done to the general law of negligence as settled by long lines of decisions by the "old Court."

I

THE LAW OF NEGLIGENCE UNDER THE OLD COURT

Under the old Court, its decisions under the Federal Employers' Liability Act and related statutes had been an important unifying influence in the development of the general law of negligence. The Supreme Court has no general jurisdiction over cases involving the general law of negligence. It has jurisdiction, in general, only where negligence cases arise under federal laws and that, for all present purposes, means cases arising under the FELA and acts immediately related to it. But in that narrow field the Supreme Court, up to the time of the election of President Roosevelt in 1932, and, indeed, up to the time when he had effectively reconstituted the personnel of the Court, in 1942, had enounced a well-settled and consistently applied set of rules of the law of negligence which had an important influence for uniformity in the development of the general body of negligence law, as enounced and applied by state and lower federal courts, comparable to the influence which its decisions had had, say, in the general fields of the law of negotiable instruments and of insurance contracts, suretyship, trusts, etc.

Since President Roosevelt accomplished his purpose of completely packing the Court, in 1942, the Court's decisions under the FELA have demonstrated an in-

[8] 35 STAT. 65 (1908), as amended, 45 U. S. C. §§51-60 (1946).

creasing tendency to repudiate that well-settled body of the law of negligence, departing either expressly or usually only *sub silentio* from former unanimous holdings of the Court in the fundamental respect of holding that any plaintiff's case under the FELA must be submitted to the jury and that the jury's verdict must be binding as to liability, no matter how absent any judicially recognizable probative evidence that the defendant was negligent and that such negligence was the proximate cause of plaintiff's injury or death, no matter how purely speculative or conjectural that evidence might be, and no matter how clearly and convincingly the evidence might have proved that the injured or deceased employee's own negligence was the sole, efficient cause, the *causa causans,* of his own injury or death.

Since President Truman again began to revamp the Court, by his own appointments, beginning with his appointment of the first Republican since President Hoover's administration, Mr. Justice Burton, in 1945, there has been a slight but observable tendency to curb that trend and to take some small steps in the direction of a return to the formerly well-settled principles of the law of negligence. How far that changed trend may go nobody can predict. At least a few cases have been won by railroads since Mr. Justice Burton was seated on October 1, 1945. For a period of five years, from the decision in the *Brady* case[9] on December 20, 1943, until the decision in *Eckenrode v. Pennsylvania R. R.,*[10] no railroad ever won a case under the FELA in the Supreme Court. Every case was won by the plaintiff. It can hardly be supposed that in that period no meritorious case was ever argued to the Court by any railroad.

Under the decisions of the old Court the following principles were well settled under long lines of cases:

The FELA does not undertake to define negligence or proximate cause. What is negligence thereunder is a matter to be determined by the application of the principles of the common law, as applied by the Supreme Court under this federal statute.[11]

In such cases, only by a uniform federal rule as to the necessary amount of evidence may litigants under the Federal Act receive similar treatment in all states.[12]

In these cases, it is for the United States Supreme Court to examine the record to determine whether, as a matter of law, there is sufficient evidence to sustain a jury finding of negligence as the proximate cause of the injury or death.[13]

When a state's jury system requires its court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of this ruling is a federal question, reviewable by the Supreme Court of the United States.[14]

[9] Brady v. Southern Ry., 320 U. S. 476 (1943).

[10] 335 U. S. 329, decided Nov. 15, 1948.

[11] Southern Ry. v. Gray, 241 U. S. 333 (1916); Tiller v. Atlantic Coast Line R. R., 318 U. S. 54, 57 (1943).

[12] Chicago, M. & St. P. Ry. v. Coogan, 271 U. S. 472, 474 (1926); Western & Atlantic R. R. v. Hughes, 278 U. S. 496, 498 (1929); Brady v. Southern Ry., 320 U. S. 476, 479 (1943).

[13] Atchison, T. & S. F. R. R. v. Saxon, 284 U. S. 458 (1932); Chicago Great Western R. R. v. Rambo, 298 U. S. 99, 102 (1936).

[14] Brady v. Southern Ry., 320 U. S. 476, 479 (1943).

The weight of the evidence under the FELA must be more than a scintilla before the case may be properly left to the discretion of the trier of the facts, usually the jury, and no rule of state law for the submission of a mere scintilla to the jury can be allowed to stand under the Federal Act.[15]

Evidence sufficient to raise only a mere speculation or conjecture as to negligence of the defendant or that such negligence was the proximate cause of injury or death is not sufficient to support a verdict finding liability to the plaintiff.[16]

When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the trial court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice, state or federal, without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.[17]

The same rule as just stated applies to questions of proximate cause as well as to questions of negligence.[18]

The bare possibility that an employee might be injured in a particular way or by a particular condition or operation is not sufficient as a basis of employer liability and an employer cannot be held to the duty of guarding against a device being employed by an employee in a dangerous way "so unusual, so contrary to the purpose" for which the device is furnished that due care would not lead the employer to expect such a use and injury.[19]

Events too remote to require reasonable provision need not be anticipated.[20]

Liability under the FELA arises from negligence, not from injury. And that negligence must be the cause of the injury.[21]

The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.[22]

It is fortuitous that two companion cases in 1932 and a case in December, 1943,

[15] Baltimore & Ohio R. R. v. Groeger, 266 U. S. 521, 524 (1925); Western & Atlantic R. R. v. Hughes, 278 U. S. 496, 498 (1929); Brady v. Southern Ry., 320 U. S. 476, 479 (1943).

[16] Chicago Great Western R. R. v. Rambo, 298 U. S. 99, 102 (1936); Brady v. Southern Ry., 320 U. S. 476, 479-480, and cases and authorities there cited, for which see note 17, *infra*.

[17] Brady v. Southern Ry., 320 U. S. 476, 479-480 (1943), citing the following: Parks v. Ross, 11 How. 362, 373 (U. S. 1850); Coughran v. Bigelow, 164 U. S. 301, 307 (1896); Anderson v. Smith, 226 U. S. 439 (1913); Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, 673 (1915); Baltimore & O. R. R. v. Groeger, 266 U. S. 521 n. 1 (1925); Gunning v. Cooley, 281 U. S. 90, 93 note (1930); Pence v. United States, 316 U. S. 332 (1942); Galloway v. United States, 319 U. S. 372 (1943); 9 WIGMORE, EVIDENCE §§2494 *et seq.* (3d ed. 1940).

[18] Brady v. Southern Ry., 320 U. S. 476, 483 (1943), citing: St. Louis-San Francisco Ry. v. Mills, 271 U. S. 344 (1926); New York Central R. R. v. Ambrose, 280 U. S. 486 (1930); Atchison, T. & S. F. Ry. v. Toops, 281 U. S. 351 (1930); Baltimore & Ohio R. R. v. Tindall, 47 F. 2d 19 (7th Cir. 1931); Texas Gulf Sulphur Co. v. Portland Gas Light Co., 57 F. 2d 801 (1st Cir. 1932). *Cf.* Story Parchment Co. v. Paterson Co., 282 U. S. 555, 556 (1931).

[19] Brady v. Southern Ry., *supra*, at 483, citing Milwaukee & St. Paul Ry. v. Kellogg, 94 U. S. 469, 475 (1876).

[20] Brady v. Southern Ry., *supra*, at 483-484.

[21] Brady v. Southern Ry., *supra*, at 484, citing Tiller v. Atlantic Coast Line R. R., 318 U. S. 54, 67 (1943).

[22] Brady v. Southern Ry., *supra*, at 484 n. 3, citing The Squib Case, 2 W. Bl. 892 and 1 COOLEY ON TORTS §50 n. 25 (4th ed. 1932) and collected cases.

each presented to the Court on behalf of the railroad by the present writer, mark the boundaries of the period within which President Roosevelt was filling the Court with his own appointees and also are landmarks in the settled law of the FELA as declared by the old Court and as above summarized.

The companion cases in 1932 were *Southern Ry. v. Youngblood,*[23] and *Southern Ry. v. Dantzler,*[24] both decided on May 16, 1932, by a unanimous Court, and reversing verdicts and judgments for plaintiffs which had been affirmed by the Supreme Court of South Carolina. The 1943 case was *Brady v. Southern Ry.,*[25] in which the Court, in a five-to-four decision, the majority opinion written by Mr. Justice Reed and concurred in by Chief Justice Stone and by Justices Roberts, Frankfurter, and Jackson, affirmed a judgment of the Supreme Court of North Carolina which had reversed a jury verdict and trial court judgment for the plaintiff on the ground that there was no sufficient evidence of employer negligence as proximate cause of the death of plaintiff's intestate to have been submitted to the jury.

All three of those cases involved the same principles of law. The two cases in 1932 were unanimous decisions. The *Brady* case in 1943, however, was a five-to-four decision, with Justices Black, Douglas, Murphy, and Rutledge dissenting. It represents the crystallization of a consistent *bloc* of those four Justices, who always voted together for the plaintiff and against the railroad in every case under the FELA, so long as those four were on the Court together. They more and more, after that case, succeeded in drawing the vote of one or more other Justices to their views, so that the *Brady* case was the last case that any railroad ever won during the next five years after the *Brady* case. Their position was that every FELA case should be submitted to the jury and that the jury's verdict should be binding, regardless of how purely speculative or conjectural the evidence of negligence and proximate causation might be and regardless of how unforeseeable the particular occurrence might have been.

Their philosophy seems to have been that every railroad employee injured, and that the dependents of every railroad employee killed, in an industrial accident should be compensated, if a jury sees fit to award them compensation, as surely as if a workmen's compensation act applied, and that a trial judge has no function to take any case from a jury or to set aside a verdict or render judgment notwithstanding the verdict, on his judicial determination that the evidence is insufficient to support a verdict as to negligence.

The holdings by the unanimous Court in the *Youngblood* and *Dantzler* cases in 1932 and by the majority of the Court in the *Brady* case in 1943 are so wholly in accord with the settled principles of negligence law as above summarized, and the dissenting opinion in the *Brady* case joined in by the *bloc* of Justices Black, Douglas, Murphy, and Rutledge so completely foreshadows what the new Court was to do to that negligence law in the next ensuing decade, that it is well to pause for a moment to consider those three cases.

[23] 286 U. S. 313 (1932).
[24] 286 U. S. 318 (1932).
[25] 320 U. S. 476 (1943).

Youngblood was the conductor and Dantzler was the engineer of a relief locomotive running light, on a single track railroad, under train orders. They of course were together in the cab of the locomotive and were acting together. They got a meet order, each receiving a written copy, to take a siding to meet and be passed by an extra train operating in the opposite direction. They read the meet order in the presence of the fireman and all three were clearly advised as to what they were ordered to do. The dispatcher and the operator intended to give them a further oral warning to the same effect as the meet order, but this was not done. Nevertheless, the written meet order they had was never revoked or modified and there was nothing that indicated to them any suggestion of a revocation or even of a repetition of the meet order.

They violated their meet order, failed to take the siding, collided with the opposing superior train, and were killed. The meet order they violated was found on the body of each. Their respective administratrices sued the railroad under the FELA. Recoveries in their favor were affirmed by the Supreme Court of South Carolina[26] on the theory that it was negligence on the part of the dispatcher and the operator not to give to them the added oral warning, which they had intended to give, in addition to but to the same effect as the written order they had received.

On certiorari, the Supreme Court of the United States reversed both cases, by unanimous decision. The principal opinion was written in the *Youngblood* case. After stating the facts and the opposing contentions, the Court said:[27]

> The case comes to this: that respondent's intestate had clear and definite orders which if obeyed would have avoided the accident and the disobedience whereof was the sole efficient cause of his death. As said in *Unadilla Valley Ry. Co. v. Caldine*, 278 U. S. 139, 142:
>
> > "A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act. Caldine had a plain duty and he knew it. The message would only have given him another motive for obeying the rule that he was bound to obey."
>
> The record is destitute of any evidence of negligence on the part of the petitioners or their servants or agents which was in any degree a cause of the death of respondent's intestate, and there was nothing to submit to the jury.

The *Dantzler* case was decided on the reasons set out in the *Youngblood* case.[28]

In the *Brady* case, the decedent, a brakeman, was killed in a switching movement by a derailment of freight cars which resulted from his failure to remove from the track a derailer before he gave the signal to switch cars into a storage track from the main line track. The purpose of the derailer on the storage track was to prevent cars on the storage track from drifting accidentally onto the main line. Brady had removed the derailer from the track and opened the switch for an immediately previous movement of cars from the storage track to the main line.

[26] Youngblood v. Southern Ry., 166 S. C. 140, 164 S. E. 431 (1931); Dantzler v. Southern Ry., 166 S. C. 148, 164 S. E. 434 (1931).

[27] Southern Ry. v. Youngblood, 286 U. S. 313, 317-318 (1932).

[28] Southern Ry. v. Dantzler, 286 U. S. 318 (1932).

Then he closed the switch for the fatal movement back from the main line into the storage track, but negligently replaced the derailer on the track in position to derail the very movement which he directed by his own signal. He was in sole charge of the switch and the derailer. No other member of the crew was near them. With the derailer left by him in the derail position on the track, he gave the signal for the movement, rode the lead car onto the derailer, and was killed in the inevitable derailment which resulted. He killed himself as surely as if he had loaded and cocked a gun, placed it to his head, and pulled the trigger.

The Supreme Court of North Carolina held[29] unanimously that there was no evidence of negligence on the part of the railroad, that the sole proximate cause of the death of Brady was his own negligent act in setting the derailer on the track and then signalling the engineer to back the cars against it. It said that the striking of the derailer from the unexpected direction "was so unusual, so contrary to the purpose" of the derailer that provision to guard against such a happening was beyond the requirement of due care. It reversed verdict and judgment for plaintiff.

The Supreme Court of the United States agreed with the North Carolina court's statement, saying, "Bare possibility is not sufficient," and citing *Milwaukee & St. Paul Ry. v. Kellogg*.[30] It further considered two purely conjectural theories of petitioner as to railroad negligence as alleged bases of liability: (1) that there were defects in the track and a negligent failure to equip the derailer with a light; (2) that some employee other than the decedent might have placed the derailer on the track prior to the movement. It held that there was no evidence that the alleged defects of track could have caused the derailment but for the intervening act of decedent in placing the derailer on the track, that there was no evidence that such derailers were ever equipped with lights, that there was no evidence that any other employee placed the derailer on the track, and that Brady's negligence in placing it on the track was the sole efficient and proximate cause of his death, insulating any theorized prior negligence of the railroad as to track conditions.

In its opinion, the Court reviewed, restated, and reaffirmed the controlling principles of law under the FELA as to which the *Brady* case is cited in the foregoing summary of that law. Under those principles there can be no question that the holding of the Court in the *Brady* case was right.

The approach of the dissenters is interesting and revealing. The dissenting opinion by Justice Black, concurred in by Justices Douglas, Murphy and Rutledge, starts with this novel statement:[31]

> Twelve North Carolina citizens who heard many witnesses and saw many exhibits found on their oaths that the railroad's employees were negligent. The local trial judge sustained their finding. Four members of this Court agree with the local trial judge that the jury's conclusion was reasonable. Nevertheless five members of the Court purport to weigh all the evidence offered by both parties to the suit, and hold the conclusion was unreasonable. Truly, appellate review of jury verdicts by application of a supposed norm of reasonableness gives rise to puzzling results.

[29] Brady v. Southern Ry., 222 N. C. 367, 23 S. E. 2d 334 (1942).
[30] 94 U. S. 469, 475 (1876).
[31] 320 U. S. 476, 484-485.

This revolutionary suggestion is that judicial review of the distinctly legal question as to the reasonableness of a jury's verdict on given evidence, by application of a well-settled legal norm of reasonableness, ought to be abandoned and replaced by a Gallup poll of jurors, trial judge, and agreeing appellate justices on the one hand against disagreeing appellate justices on the other. Let rules of law be left to popular vote and let the judiciary abdicate its constitutional function! The reference to the twelve jurors being "on their oaths" was sly but gratuitous. Everybody concerned was under oath, the jurors, the trial judge, the five members of the Supreme Court of North Carolina, the nine members of the Supreme Court of the United States, and even the lawyers who argued the case in all the courts. Yet the philosophy of the law expressed by the dissenting *bloc* of four Justices was that twelve jurors, a trial judge and four members of the Supreme Court = 17; that five members of the Supreme Court of North Carolina and five members of the highest court in the land =10; *ergo,* that plaintiff should recover as upon a 17-to-10 plebiscite.

Indeed what has just been said in the preceding paragraph is overgenerous to Mr. Justice Black. He conveniently overlooked the fact that five eminent judges on the Supreme Court of North Carolina had held unanimously for the railroad and against the plaintiff. He made no mention of them in his Gallup poll. It is clear that the plebiscite which he had in mind was even more extravagant; *i.e.,* 12 jurors + 1 trial judge + 4 dissenters on the Supreme Court of the United States = 17; five members constituting the majority of the highest court = 5. *Ergo,* the plaintiff should recover as upon a 17-to-5 plebiscite.

That attitude was to be reflected time and again by the same four Justices in subsequent cases.

The dissenting opinion refused to agree that the "uniform federal rule" on directed verdicts announced by the Court correctly stated the law, but placed the dissent on a labored effort to show that the jury might reasonably have based its verdict on a finding that some undisclosed member of the crew other than Brady *might have* placed the derailer on the track and on a finding that an alleged defect in the rail opposite the derailer *might have* caused the casualty, regardless of the presence of the derailer on the track, although the track had been safely used for years and no such accident had ever happened except in this case where the derailer was placed and left on the track. The dissent is open advocacy of allowing a jury to award damages on no evidence but speculation.

In the above summarization of the law of negligence under the FELA as declared by the Court up to and including the *Brady* case, we have omitted any treatment of the doctrine of assumption of risk as a defense because Congress, by the amendment of 1939,[32] abolished assumption of risk as a defense and that doctrine

[32] Act of Aug. 11, 1939, 53 STAT. 1404, 45 U. S. C. §54 (1946). For example, the earlier case of Tiller v. Atlantic Coast Line R. R., 318 U. S. 54 (1943), cited and relied on by the Court's opinion in the *Brady* case, and decided on February 1, 1943, turned entirely on assumption of risk and its abrogation as a defense by the amendment of 1939.

has since had no application in cases under the Act. Similarly we have not summarized the former law of contributory negligence as a defense, because contributory negligence was abolished as a defense and left only as a basis of a comparison of negligence between plaintiff and defendant in diminishment of damages, by the older amendment of 1908.[33]

In the *Brady* case the death occurred prior to the amendment of 1939, but the case was tried subsequent to that amendment. The railroad, as an additional defense, pleaded Brady's assumption of the risk of his own injury under the law as it stood when he was killed. One of the grounds on which the Supreme Court granted certiorari was to consider whether the amendment of 1939 was retroactive, in its abolition of assumption of risk as a defense, as applied to a death which occurred before its enactment. Decision of that question was rendered unnecessary by the Court's holding that there was no sufficient evidence to go to the jury on the negligence issue.[34]

The Supreme Court has never passed on the question whether the amendment of 1939 was retroactive to eliminate assumption of risk as a defense in a case on a cause of action arising prior to the amendment. Of course, no such case could now arise.

II

By Its Decisions in FELA Cases Since the Brady Case, the Supreme Court Has Progressively Undermined the Law of Negligence

As early as the October Term, 1941, a new trend of decisions had been indicated in *Jacob v. New York City*.[35] That was just after President Roosevelt's seventh Democratic appointee to the Court, Mr. Justice Jackson, had been seated on October 6, 1941.

The *Jacob* case did not arise under the FELA, but the decision had direct application to cases under that Act, because it arose under the Jones Act,[36] applicable to seamen and which incorporated the FELA by reference. It indicated doubt as to the application of the well-settled "simple tool doctrine," which formerly applied to cases under the FELA. That doctrine was that as to simple tools, where the servant using them has at least as good an opportunity to observe and determine their condition as the master, there is no duty of inspection resting upon the master and no liability on his part for a defective condition.

Jacob, an experienced seaman, was injured when a worn wrench slipped off a nut by reason of the loose fit of the tool. There was testimony by him that he had called the attention of his foreman to the alleged defective condition of the wrench sometime before and had requested a new one.

The Court, in an opinion by Mr. Justice Murphy, in which Justices Frankfurter and Jackson concurred in the result but Chief Justice Stone and Justices Roberts

[33] Act of April 22, 1908, 35 STAT. 66, 45 U. S. C. §53 (1946).
[34] See 319 U. S. 777, 320 U. S. 476, 477.
[35] 315 U. S. 752, decided on March 30, 1942.
[36] 41 STAT. 1007 (1920), 46 U. S. C. §688 (1946).

and Reed dissented, without expressly overruling the simple tool doctrine, cast considerable doubt upon its continued application to cases under the Jones Act and under the FELA, saying:[37]

> The simple tool doctrine, used by the courts below to bolster their belief that the evidence was insufficient, does not affect our conclusion. In the first place, the contrariety of opinion as to the reasons for and the scope of the simple tool doctrine, and the uncertainty of its application, suggest that it should not apply to cases arising under legislation, such as the Jones Act, designed to enlarge in some measure the rights and remedies of injured employees. But even assuming its applicability, the doctrine does not justify withdrawing this case from the jury.

The Court went on to hold that even if the doctrine applied, the facts did not invoke the doctrine in view of the plaintiff's notice to the master that the simple tool was defective and his request for a new tool.

The dissenters obviously thought that the case should not have gone to the jury. The concurrence of Justices Frankfurter and Jackson in the result obviously indicated that they did not agree with the dictum that the simple tool doctrine might not be applicable at all under the Jones Act and under FELA. Those who joined fully in the opinion of Mr. Justice Murphy were only Justices Black, Reed, Douglas, and Byrnes. The dictum was ominous for the future development of the law of negligence.

The 1942 Term

An early case at the October Term, 1942, *Lilly v. Grand Trunk R. R.*,[38] in which the opinion was written by Mr. Justice Murphy and concurred in by the entire Court, except that Mr. Justice Frankfurter limited his concurrence to the result of the decision, continued the trend of broadening rules of liability in favor of the employee and against the employer and upset previous concepts as to liability under the Boiler Inspection Act.[39]

Unlike the FELA, the Boiler Inspection Act does not limit employer liability to cases of its negligence, but imposes an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate ". . . without unnecessary peril to life and limb," and any violation of that absolute duty which proximately causes injury or death to an employee imposes absolute liability, in a suit brought under the FELA, regardless of non-negligence of the employer.[40] Obviously any unwarranted broadening of the coverage of the Boiler Inspection Act imposes a new and absolute liability against which there is no defense at all and which cannot be avoided by the highest degree of carefulness.

A long line of state and lower federal court cases had held that the requirements of the Boiler Inspection Act and of the corresponding Safety Appliance Acts[41]

[37] 315 U. S. 752, 756-757 (footnote omitted). [38] 317 U. S. 481 (1943).
[39] 36 STAT. 913 (1911), as amended, 45 U. S. C. §22 *et seq.* (1946).
[40] Lilly v. Grand Trunk R. R., 317 U. S. 481, 485-486, and cases there cited.
[41] 27 STAT. 531 (1893), as amended, 45 U. S. C. §1 *et seq.* (1946).

covered only defects in construction or operation, within the employer's control, and not merely the presence of some dangerous object or foreign matter such as grease, coal, or ice from natural causes.[42]

In the *Lilly* case, petitioner slipped and fell, while he was pulling a waterspout, by reason of sliding on ice formed by natural causes. He alleged a true defect in a leak at the collar of the manhole from which water flowed onto the tender's surface and froze. The jury rendered a general verdict for petitioner, but by a special verdict found that there was no leak in or near the manhole. Obviously the general verdict was based on evidence only of the presence of ice and not of any mechanical defect. The appellate court of Illinois reversed a judgment on the verdict in favor of petitioner and against the railroad.

The Supreme Court reversed, holding that the absolute liability of the Act applied to the mere presence of ice on the tender, in effect overruling the whole line of cases cited in footnote 42 above, and broadening the coverage of the Act beyond any previously recognized concept.

We have heretofore briefly mentioned *Tiller v. Atlantic Coast Line R. R.*,[43] as having preceded the *Brady* case at the October Term, 1942, and as being concerned only with the defense of assumption of risk as abolished by the amendment of 1939 to the FELA. However, it had much deeper implications flowing from the language used by Mr. Justice Black in his opinion for the Court, language which Mr. Justice Frankfurter sought properly to limit in his concurring opinion.

The 1939 amendment[44] was carefully limited in its terms. It merely provided that, in any action brought under the FELA by an employee, he "shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ."

As Mr. Justice Frankfurter pointed out, this amendment clearly did not mean to abolish "assumption of risk" in the loose sense in which courts and lawyers had for centuries misused that term to mean that an employee always assumes the risk of natural and unavoidable hazards of his occupation, *not caused by negligence of his employer,* an excellent illustration, as Mr. Justice Frankfurter said, "of the extent to which uncritical use of words bedevils the law." The amendment only abolished assumption of risk in the other, technical sense, as a former common-law defense where the danger *was caused by the negligence of the employer* but was so apparent to the employee that courts held that the employee assumed the risk regardless of the employer's negligence. "The 1939 amendment," as Mr. Justice

[42] Ford v. New York, N. H. & H. R. R., 54 F. 2d 342 (2d Cir. 1931) (grease on a grab-iron); Reeves v. Chicago, St. P., M. & O. Ry., 147 Minn. 114, 179 N. W. 689 (1920) (coal on a step); Slater v. Chicago, St. P., M. & O. Ry., 146 Minn. 390, 178 N. W. 813 (1920) (an ice bunker misplaced by a trespasser so as to project upon the running board); Chicago, R. I. & P. Ry. v. Benson, 352 Ill. 195, 185 N. E. 244 (1933) (wire wrapped around a grab-iron); Harlan v. Wabash Ry., 335 Mo. 414, 73 S. W. 2d 749 (1934) (failure of employees to close a trap-door over a stoker); Riley v. Wabash Ry., 328 Mo. 910, 44 S. W. 2d 136 (1931) (clinker hook misplaced on a tender top by a fellow servant).

[43] 318 U. S. 54, decided Feb. 1, 1943.

[44] Act of Aug. 11, 1939, 53 STAT. 1404, 45 U. S. C. §54 (1946).

Frankfurter said,[45] "left intact the foundation of the carrier's liability—negligence" and only wrote out of the Act "'assumption of risk' as a defense where there is negligence" of the employer.

But Mr. Justice Black was not content with that clearly limited effect of the amendment in abolishing assumption of risk as a defense only where the carrier is negligent. He used broad enough language to imply that assumption of risk had also been abolished as a defense even where no negligence of the employer caused the risk but where it was a risk naturally inherent in the occupation.

Although his opinion gave a long, historical analysis of the development and use of the term in England and America and recognized the two inconsistent and ambiguous uses of the term pointed out by Mr. Justice Frankfurter, Mr. Justice Black said,[46]

> We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to "non-negligence."

Of course the two defenses were not at all "identical." They were wholly different. The one which Congress abolished was the use of the term "assumption of risk" as a defense where the risk was caused by the negligence of the carrier. The other, the use of the term to refer to "non-negligence" of the carrier, the assumption of a natural and unavoidable risk of the occupation *not caused by carrier negligence,* plainly was not abolished by the *amendment.* The liability requirement of carrier negligence, as demonstrated by Mr. Justice Frankfurter, was specifically preserved by the very language of the amendment.

But Mr. Justice Black, by the language above quoted, obviously meant to hold that assumption of risk was "obliterated" in both senses, wholly contrary to the plain language of the statute itself. His attitude was further shown by his added statement:[47]

> No case is to be withheld from a jury on *any theory of assumption of risk;* and questions of negligence should under proper charge from the court be submitted to the jury for their determination.

This was not only saying that the 1939 amendment had a meaning which Congress expressly did not intend, but it was further saying that every "question of negligence" must be submitted to the jury regardless of the evidence, a view repeated in his dissent in the *Brady* case,[48] but squarely rejected by the Court in that case.

Thus the *Tiller* case was another dangerous precedent in the trend toward completely rewriting the law of negligence and leaving the carrier with no defense in any case, not even the one still left as the basis of the FELA, the non-negligence of the employer.

[45] 318 U. S. at 68-72.
[46] *Id.* at 58.
[47] *Id.* at 67 (italics supplied).
[48] 320 U. S. at 476.

And yet in another later case in the same volume, *De Zon v. American President Lines*,[49] Mr. Justice Jackson, writing the opinion for the Court, concurred in by Chief Justice Stone and by Justices Roberts, Reed, and Frankfurter, made it perfectly clear that it was still the law of the Jones Act and of the FELA that negligence of the employer was the sole basis of liability and that where there was insufficient evidence of such negligence the case should not be submitted to the jury. Of course, Justices Black, Douglas, and Murphy dissented, vigorously asserting that a plaintiff has a constitutional right to have a jury pass on every such case and that no judicial review of the jury's determination should be permitted. Mr. Justice Rutledge did not participate in the consideration or decision but, if he had, it seems fairly certain that the *bloc* of four dissenters would have been solid.

Truly, at that point, as between the *Tiller* and *De Zon* cases, it was anybody's guess as to which way the Court would next jump on the fundamental proposition that the FELA does not impose liability without fault and that a case should not be submitted to the jury in the absence of sufficient evidence of negligence of the carrier proximately causing the injury or death to comply with the judicial standard of reasonableness.

The next case, *Bailey v. Central Vermont Ry.*,[50] held with the administratrix of a deceased employee and against the railroad, in a very close case, reversing the Supreme Court of Vermont which had reversed judgment upon a verdict for plaintiff on the ground that there was no sufficient evidence of negligence of the railroad to warrant submission to the jury.

We need not here review the evidence. This writer cannot say that the holding was wrong, only that it was debatable. The decedent fell from a bridge, with no guard-rail, on which he was working in a customary way. The Court, in an opinion by Mr. Justice Douglas, held that there was "sufficient evidence to go to the jury on the question whether, as alleged in the complaint, respondent was negligent in failing to use reasonable care in furnishing Bailey with a safe place to do the work."[51] This holding was very fairly stated.

Mr. Justice Douglas did not misstate the rule of law, as it is so often misstated, to imply that the law imposes an absolute duty to furnish a safe place to work or a duty to furnish an absolutely safe place to work. No such duty is imposed by the law. There can be no absolutely safe place to work on a railroad bridge. The duty is only "to use reasonable care in furnishing" a safe place to work, as Mr. Justice Douglas stated it. He also recognized that employer negligence is a prerequisite to liability and that there must be sufficient evidence of such negligence to warrant submission to the jury. Yet he used broad language to assert that "the jury is the tribunal under our legal system to decide that type of issue," citing the *Tiller* case, "as well as issues involving controverted evidence," citing other cases. Then he waxed even more emphatic, saying, "To withdraw such a question from the jury is to usurp its functions."[52]

He further suggested that the method of trial by court and jury[53]

[49] 318 U. S. 660 (1943).
[50] 319 U. S. 350 (1943).
[51] *Id.* at 352.
[52] *Id.* at 353-354.
[53] *Id.* at 354.

of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

This suggestion called forth from Mr. Justice Roberts, in his separate opinion, the following observation:[54]

Finally, I cannot concur in the intimation, which I think the opinion gives, that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault. I yield to none in my belief in the wisdom and equity of workmen's compensation laws, but I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence.

In *Owens v. Union Pacific R. R.*,[55] there was again presented the question whether the 1939 amendment, abolishing assumption of risk as a defense, applied retroactively to a cause of action arising prior to that amendment. Again the Court declined to pass on that question because it found that, if the amendment did not apply and if the old defense of assumption of risk did apply, on the evidence in the case the deceased employee had not, as matter of law, assumed the risk of a danger caused by negligence of his fellow servants. No opinion was expressed as to whether the evidence showed negligence on the employer's part, since the court below had not dealt with that question. It is implicit in the opinion of the Court by Mr. Justice Rutledge, however, that sufficient evidence of negligence of the employer was essential before the case could be submitted to a jury. Mr. Justice Reed, joined by Chief Justice Stone and Mr. Justice Roberts, dissented on the ground that, in their view of the evidence, the defense of assumption of risk, as it stood prior to the amendment of 1939, was good.

It will be observed that no railroad won a case at the October Term, 1942. Every case was won by the plaintiff.

The 1943 Term

The first case at the October Term, 1943, was *Brady v. Southern Ry.*,[56] and it interrupted the current trend. The railroad won that case by a five-to-four decision, but it was the last case to be won by any railroad for five years. It has been fully reviewed. The majority opinion by Mr. Justice Reed, carefully reviewed, restated, and reaffirmed the leading principles of the law of negligence under the FELA as they had been declared under the "old Court" and in long lines of decisions. The dissentient *bloc* of Justices Black, Douglas, Murphy, and Rutledge was solidified in opposition to taking any plaintiff's case from the jury.

[54] *Id.* at 358.
[55] 319 U. S. 715, decided June 14, 1943.
[56] 320 U. S. 476, decided Dec. 20, 1943.

Yet the very next month, on January 17, 1944, the Court decided *Tennant v. Peoria & P. U. Ry.*,[57] opinion by Mr. Justice Murphy, separate concurrence by Justices Frankfurter and Jackson, dissent by Chief Justice Stone and Mr. Justice Roberts, which followed the *Tiller* and *Bailey* cases in holding for the plaintiff employee and, strangely enough, although it cited a number of older cases, made no reference to the *Brady* case of the preceding month, which was the latest decision under the Act.

The *Tennant* case seems clearly in conflict with the *Brady* case, although it did not purport to cast any doubt on the correctness of the *Brady* decision and did not even mention it. Indeed, the majority opinion, by Mr. Justice Murphy, specifically reaffirmed the fundamental principles: (1) that, in order to recover under the FELA, it is incumbent on the plaintiff to prove that the employer was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident, citing the *Tiller* case; (2) that plaintiff is required to present probative facts from which both the negligence and the causal relation can reasonably be inferred; and (3) " 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' "[58]

That was a perfectly clear and correct statement of the controlling principles of law, entirely in line with the opinion and decision in the *Brady* case. Where the *Tennant* case departed from the *Brady* case, in the opinion of this writer, was that in the *Tennant* case the Court did not correctly apply the very principles of law it there enounced, but authorized a jury finding of proximate causation by allowing pure speculation "to do duty for probative facts." To demonstrate this error it is necessary to review the facts.

The intestate, Tennant, was an experienced switchman in switching yards in which he had worked for several years and with which he was perfectly familiar. On the night in question his crew was engaged in one of its nightly tasks of coupling freight cars and removing them from a track. A Diesel-electric engine was brought down onto the track from the north, and its front, or pilot, end was headed south. There were about twenty cars in various groups on this track. They were to be coupled together and moved northward out of this track to other locations. In the course of these coupling operations, the engine stopped and started six or eight times, gradually moving southward.

After all the twenty cars had been coupled, the engine remained stationary for five or ten minutes before the engineer received the back-up signal from the foreman. While waiting for the back-up signal, the engineer saw Tennant on the west side of the engine placing his raincoat in a clothes compartment beneath the cab window. After putting on a cap and jacket he walked around the north, or rear, end of the engine, and was never seen alive after that. There were no eye witnesses

[57] 321 U. S. 29 (1944).

[58] Citing and quoting from Galloway v. United States, 319 U. S. 372, 395 (1943) and citing with approval Atchison, T. & S. F. Ry. v. Toops, 281 U. S. 351 (1930).

as to what happened to Tennant and no direct evidence as to his precise location at the moment he was killed. It was his duty to stay ahead of the engine as it moved back out of the track, protect it from other train movements, and attend to the switches.

When the engineer received the back-up signal from the foreman, he obeyed and pulled the twenty cars out of the track. The fact that Tennant was missing was first noticed when the engine reached a point some distance north of the switch. An investigation revealed blood marks on the track in question, about seven or eight car lengths south of the switch. There was a pool of blood a foot and a half north of those marks. Nearby, between the rails, were Tennant's right hand, his cap, and his lighted lantern. His torso was found at the switch, while his head was discovered about fourteen car lengths north and west of the switch.

An examination of the engine and cars disclosed only a tiny bit of flesh on the outside rim of the north wheel of the third car from the engine. There was no evidence of his having slipped or fallen from any part of the engine or cars or of his having been struck by the engine itself. The evidence clearly indicated that he was first struck by the third car from the engine.

The case was submitted to the jury on the allegation that Tennant's death resulted from the railroad's negligence, in that the engineer backed the engine and cars northward out of the track without first ringing the engine bell, which was alleged to be in violation of a company rule. There was conflicting evidence as to whether the rule was for the benefit of crew members who were aware of switching operations and as to whether it was customary for the bell to be rung under such circumstances. The rule in question itself specifically provided: "The unnecessary use of either the whistle or the bell is prohibited."

In the present writer's view, even if the jury was justified in finding a violation of the rule in the failure to ring the bell, as constituting negligence, still there was an utter absence of evidence sufficient to sustain a jury finding that such negligence was in any way the proximate cause of the death of Tennant. How he came to his death can only be the subject of speculation and conjecture. One man's guess is as good as another's.

The gruesome details as to his blood and dismembered remains, while they naturally tend to exert a "hydraulic pressure" of sympathy on any mind considering those details, logically had no tendency to prove how Tennant was killed. They only proved that he was killed by being run over, but how and where he came in contact with the train of cars, or how he came to be under the moving wheels, was left entirely to guess or speculation.

True, one crucial fact which was outstanding in the *Brady* case was absent from the *Tennant* case. Brady knew all the surrounding conditions and he himself gave the signal for the fatal movement. Tennant, while he apparently knew all the surrounding conditions, did not give the signal for the fatal movement. It was given by his foreman. Perhaps this is the factual difference which controlled the

difference in decision in the two cases. However, it is hard for this writer to see in the *Tennant* case any proof that the alleged negligent failure to ring the bell was the proximate cause of Tennant's death. He may have stumbled and fallen between the cars. He may have fallen off a car. He may have been walking ahead of the engine and been struck by it. Or he might even have been the victim of a heart attack. The causative element simply was not made to appear in the evidence.

It seems to this writer that Mr. Justice Murphy's opinion completely overlooked the fact that the burden of proof was on the plaintiff, and not on the defendant. It indulged a presumption that Tennant was not negligent, and, upon that presumption, erected another presumption, not supported by proof, that the railroad's negligence was the proximate cause of his death.

It will be observed that the *Brady* case was the only case won by a railroad, and that by a bare five-to-four decision, and that the other case, *Tennant*, at the 1943 Term, was decided against the railroad and in favor of the plaintiff, on purely speculative evidence, and that the Court did not even cite the most recent *Brady* case in the *Tennant* opinion.

The 1944 Term

At the 1944 Term, the *Tiller* case came back to the Supreme Court a second time[59] and again was lost by the railroad, Mr. Justice Black writing the opinion for the Court and Chief Justice Stone and Justice Roberts dissenting.

Following the previous decision by the Supreme Court in that case[60] the plaintiff sought to "mend her licks" by amending her complaint in the district court, over the railroad's objection, by charging that, in addition to railroad negligence previously alleged, the decedent's death was caused by the railroad's violation of the Boiler Inspection Act[61] and the Rules and Regulations prescribed by the Interstate Commerce Commission pursuant to the provisions of that Act. Thus, in case she should fail to get a jury verdict on the issue of railroad negligence, she sought to clinch her recovery by invoking the theory of the Boiler Inspection Act of absolute liability regardless of non-negligence of the railroad. The jury returned a verdict in favor of the plaintiff, the district court refused to set it aside, but the Court of Appeals for the Fourth Circuit reversed.[62] The Supreme Court again granted certiorari on the plaintiff's petition.

The Court of Appeals, since the evidence on the issue as to railroad negligence at the second trial was substantially the same as at the first trial, bowed to the first decision of the Supreme Court (318 U. S. 54), that the evidence on that issue was sufficient to go to the jury. But, since plaintiff had amended her complaint to specify a new element of liability under the Boiler Inspection Act and Rules as an alternative ground for recovery, and since the verdict was a general one and hence did not disclose whether it was based on the old negligence issue or on the new Boiler

[59] Tiller v. Atlantic Coast Line R. R., 323 U. S. 754, decided Jan. 15, 1945.
[60] Tiller v. Atlantic Coast Line R. R., 318 U. S. 54 (1943).
[61] 36 STAT. 913 (1911), as amended, 45 U. S. C. §22 *et seq.* (1946).
[62] Atlantic Coast Line R. R. v. Tiller, 142 F. 2d 718 (4th Cir. 1944).

Inspection Act issue, the Court of Appeals dealt with the latter issue as uncontrolled by the previous decision by the Supreme Court, and held that there was no evidence that the alleged violation of the Boiler Inspection Act was "the proximate cause of the accident in whole or in part."

The alleged violation of the Boiler Inspection Act and of the Commission's rules pursuant thereto was a failure to have the locomotive in yard service between sunset and sunrise equipped with

> two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions . . . to see a dark object . . . for a distance of at least 300 feet ahead and in front of such headlight. . . .

The locomotive, which pushed backwards the string of cars one of which struck and killed the decedent Tiller, was operated in yard service between sunset and sunrise, had such a headlight as required properly burning on its front end, but did not have such a light burning on its rear end. If such a light had been burning on the rear end, its illumination would have been cut off by the cars attached to that end and could not have disclosed to the persons in the cab the "dark object," Tiller, for a distance of 300 feet. The Court of Appeals so held and hence held that, even if the light rule was violated, that violation could not have been the proximate cause of Tiller's death since, obviously, even if the rear-end light had been burning it could not have disclosed to the locomotive crew the presence of Tiller in the path of the moving cars, since the cars themselves would have cut off the illumination of that light. In this writer's view, that was obviously a sound holding.

Mr. Justice Black, for the Supreme Court, assumed without deciding that the railroad could, consistently with the rule, so obscure the rear-end light,[63] but he held that the jury had the right to find (speculate, I think; nothing in the evidence proved it) that[64]

> the diffused rays of a strong headlight even though directly obscured from the front, *might easily have spread themselves* so that *one standing within three car lengths of the approaching locomotive would have been given warning of its presence,* or at least so the jury might have found.

It will at once be observed that this holding was a distinct perversion of the very terms of the rule relied upon. The rule did not require a light sufficient to give one standing in the path of the locomotive and cars a warning of their presence or approach. It only required a light sufficient to give a warning to "a person in the cab" of the presence of "a dark object" within 300 yards. The warning contemplated by the rule was to be given to the locomotive crew, not to the "dark object" in the path of the movement.

[63] Nothing in the rule denied to the railroad the right to obscure such a light with cars attached to a yard engine. The practice was general railroad practice. Indeed the only function of a yard engine, even between sunset and sunrise, is to handle cars at one or the other of its ends. It has no function to operate merely in "splendid isolation."

[64] 323 U. S. at 578-579 (italics supplied).

On the facts it would have been simply ridiculous for the jury to have found that if the light had been burning it would, through the intervening obstruction of the cars, have illuminated Tiller so as to have warned the locomotive crew of his presence in the path of the movement, which was the sole requirement of the rule. The opinion by Mr. Justice Black did not even suggest that the jury verdict could have lawfully been based on that theory. Instead, the opinion in terms held that the jury could competently have found that rays of the light, if burning, and in spite of the complete obstruction of the intervening cars, "might easily have spread themselves" so as to warn Tiller of the approaching locomotive, which was neither the purpose nor the effect of the rule relied on. And even as to that theory, not within the rule at all, the opinion authorized a jury verdict to be based on mere guess or speculation.

The holding was obviously contrary to the holding in the *Brady* case, yet that recent case was not referred to in the opinion. As stated, Chief Justice Stone and Mr. Justice Roberts dissented.

The trend against railroads and in favor of employees was quickly continued in *Blair v. Baltimore & O. R. R.*,[65] decided the same month, January 29, 1945, in which again Mr. Justice Black wrote the opinion for the Court and Chief Justice Stone and Mr. Justice Roberts dissented. Again the majority of seven Justices, all appointed by President Roosevelt, did not "think like" Chief Justice Stone, to use the President's own phrase.

That case also arose prior to the amendment of 1939, which abolished assumption of risk as a defense. Again the Court refused to pass upon the question whether that amendment applied retroactively to a cause of action which arose prior to its enactment, because it held that, even if the old defense of assumption of risk was available in the case, on the evidence the employee had not, as matter of law, assumed the risk of his own injury.

In unloading a car standing at a platform, it was Blair's duty to move three 10-inch seamless steel tubes, approximately 30 feet long and which were greased and slick. He went to his superior, informed him that the pipes were too heavy for him to move, and suggested that it was not customary for the railroad to unload pipes of this kind at its warehouse, but to send the car directly to the consignee's place of business where it had proper equipment for unloading heavy material. The suggestion was rejected and Blair was told to get two other men to help him. He insisted that three men could not unload the heavy pipes, but that suggestion was overridden and he was told to go ahead and do the work or they "would get somebody else that would." He and the other two men then undertook to do the work with the best available equipment, a "nose truck." One pipe was moved successfully. The second pipe slipped, while they were undertaking to handle it in the same manner, causing the truck to kick back, injuring Blair.

There was indication in the evidence, said Mr. Justice Black, that the immediate

[65] 323 U. S. 600 (1945).

cause of the greasy pipe's slipping as it did was either (1) an uneven place on the warehouse floor due to its having sunken in; or (2) pushing the nose truck against the standing company truck with such force as to make the tube move with great suddenness (obviously wholly inconsistent theories as to causation). It was further suggested in support of recovery that the fact that the other two men released their grip after the pipe began to slip also contributed to the suddenness and force of the kickback of the nose truck.

The Pennsylvania Supreme Court reversed verdict and judgment for Blair, holding that he had assumed the risk of his injury by remaining in employment and that there was no evidence to support a finding of railroad negligence in any respect.[66] The Supreme Court of the United States reversed that holding by a seven-to-two decision. We do not argue here the merits of that decision, although that it was highly debatable is shown by the fact that Chief Justice Stone and Mr. Justice Roberts dissented. As to assumption of risk, it is not important for the future, in view of the amendment of 1939 abolishing the defense of assumption of risk in any case in which negligence of the employer proximately causes the injury in whole or in part. The case is significant of the trend of decisions on negligence issues in the following expressions in Mr. Justice Black's opinion for the Court:[67]

> To deprive railroad "workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 354.

and[68]

> We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer "becomes 'more imperative' as the risk increases." *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 352, 353. See also *Tiller v. Atlantic Coast Line*, 318 U. S. 54, 67. The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific R. Co. v. Hadley*, 246 U. S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.

The first of the above quotations is pure *petitio principis*, completely begs the very question before the Court. If the evidence was not sufficient to meet the judicial test for submission to the jury on the negligence issue, then to take the case from the jury would not take away "a goodly portion" or any portion of the relief which Congress had afforded railroad workers, because Congress had afforded them no remedy at all except for injuries caused by employer negligence. This statement of the opinion, quoted from the *Bailey* case, is singularly unhelpful to lawyers, litigants, or to lower court judges. The second statement, with its mixed metaphor of closely interwoven elements forming a single pattern, each element

[66] 349 Pa. 436, 37 A. 2d 736 (1944).
[67] 323 U. S. 600, 602.
[68] *Id.* at 604.

imparting character to the others, is equally unhelpful. Both indicate merely a growing determination, following the *Tiller* and *Bailey* cases, to let all cases go to the jury. It is again significant that the opinion does not mention the recent *Brady* case.

In *Herb v. Pitcairn*,[69] the Court split wide open on what seems to have been a very simple and plain matter. In two cases under the FELA there dealt with, the majority of the Court, in an opinion by Mr. Justice Jackson, concurred in by Chief Justice Stone and Justices Roberts, Reed, and Frankfurter, held that since the records were ambiguous as to whether the state court judgments of dismissal rested on a federal ground or on an adequate state ground, the causes would be continued for such period as would enable counsel for petitioners with all convenient speed to apply to the state court for amendment, or certificate, showing whether it intended to rest its judgments on the state ground or the federal ground.

The case did not involve any principle of the law of negligence and, hence, is outside the scope of this paper. It involved a question of jurisdiction of a state court under the law of Illinois. It also involved a federal question, whether the action was barred under the FELA. Mr. Justice Jackson, for the Court, properly held that from the time of its foundation the Supreme Court had adhered to the principle that it would not review judgments of state courts that rest on adequate and independent state grounds. Since the state court, in this case, had left it ambiguous whether its judgment rested on the state ground or the federal ground, the Supreme Court, instead of dismissing the case because the federal ground did not clearly appear, held the case pending application to the state court for clarification or amendment, an eminently sensible thing to do.

Obviously motivated by a strong feeling that the plaintiffs had been subjected to the law's delays and that their path to verdict and recovery against the railroad ought to be speeded, Mr. Justice Black filed a vigorous dissent, joined in by Justices Douglas and Murphy. He seemed to think that the state court ground was trivial, even non-existent, that the federal ground clearly appeared, and that it ought to be decided at once, so as to speed the plaintiffs to recovery.

Mr. Justice Rutledge filed a separate dissent, taking the position that the state court judgment was clearly based on decision of the federal question and that that decision was wrong and ought to be reversed without further delay.

The *bloc* of four dissenters was solid in favor of the plaintiffs.

The case came back to the Supreme Court in *Herb v. Pitcairn*,[70] on a certificate from the Supreme Court of Illinois making it clear that its decision had rested on the federal ground of the bar of the statute. Mr. Justice Jackson, writing for the unanimous Court, held that that question had been wrongly decided and reversed the judgment of the state court. The perfervid dissents in the first decision thus appear to have been "much ado about nothing," except to show the fixed penchant of the four dissenters in favor of plaintiffs under the FELA.

It will again be seen that no case was won by a railroad at the October Term, 1944, unless the brief delay in first *Herb v. Pitcairn* be considered a Pyrrhic victory.

[69] 324 U. S. 117, decided Feb. 5, 1945.

[70] 325 U. S. 77, decided April 23, 1945.

The 1945 Term

Poff v. Pennsylvania R. R.,[71] continued the trend of decisions in favor of plaintiffs and against railroad defendants. Here, again, the case did not involve any question of negligence law. Negligence was conceded. The sole question was whether a cousin of the deceased employee, who was dependent, had a right to recover as beneficiary under the statute, when two sisters and a nephew survived, nearer of kin to the decedent than the cousin but not dependent.

The FELA provided that the carrier's liability in case of the death of an employee, caused by carrier negligence, runs:

> to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee . . .

This deceased employee left no widow, no child, and no parent surviving. His surviving next of kin were two sisters and a nephew, not dependent and hence not beneficiaries for whom recovery could be had under the statute. The remoter surviving kinsman, the cousin, while dependent, was not the "next of kin" and hence clearly was not a proper beneficiary under the statute and under the clear rule of many cases.[72]

Yet Mr. Justice Douglas, writing for the majority of the Court, stretched the statutory grant of beneficiary right so as to cover the dependent cousin who plainly was not "next of kin." And this was done, forsooth, because otherwise "the nearer next of kin who are not dependent are [would be] treated as a preferred class not for the purpose of allowing them to recover but to defeat a recovery by all next of kin" (p. 402). Yet this is just what the Act of Congress plainly intended, and the majority "drove a coach and four" through the Act in order to make a beneficiary one whom Congress, by apt language, had intended to exclude.

Mr. Justice Douglas was joined in this decision by Chief Justice Stone and by Justices Black, Reed, Murphy, and Rutledge.

Mr. Justice Jackson, absent at Nuremberg, took no part. Mr. Justice Frankfurter, joined by Mr. Justice Burton, dissented on the ground that Congress plainly did not intend to make a remote dependent who was not "next of kin" a beneficiary under the Act.

Not only had the Supreme Court in the recent series of decisions, to use Mr. Justice Roberts' phrase, stretched the law of negligence so as virtually to make of a negligence statute a workmen's compensation statute. In this case it went further and created, by judicial legislation, a whole new class of beneficiaries whom Congress had not made beneficiaries under the Act.

In *Lavender v. Kurn*,[73] the Court reached the *ultima Thule* for authorizing a recovery on purely speculative evidence, in an opinion by Mr. Justice Murphy, joined

[71] 327 U. S. 399, decided Feb. 25, 1946.

[72] Michigan Central R. R. v. Vreeland, 227 U. S. 59, 68 (1913); Gulf, C. & S. F. Ry. v. McGinnis, 228 U. S. 173, 175 (1913); Garrett v. Louisville & N. R. R., 235 U. S. 308, 313 (1914).

[73] 327 U. S. 645, decided March 25, 1946.

in by Justices Black, Douglas, Rutledge, and Burton. Chief Justice Stone and Mr. Justice Frankfurter concurred only in the result, not in the majority opinion. Mr. Justice Reed dissented. Mr. Justice Jackson, absent at Nuremberg, took no part.

To make clear the extraordinary nature of the holding and its complete departure from settled precedents, it is necessary to review the facts. The decedent, Haney, was a switchtender near Grand Central Station in Memphis and his duties included the throwing of switches for the Illinois Central, the Frisco, and other railroads using that station. On a dark evening, about 7:30, a west-bound interstate Frisco passenger train stopped on the Frisco main line, its rear some 20 or 30 feet west of a switch in the charge of Haney. In performance of his duties, Haney threw or opened the switch on the north side of the track to permit the train to back into the station.

The railroad claimed that Haney was then required to cross to the south side of the track before the train passed the switch. The conductor of the train testified that he saw Haney so cross. There was evidence also that Haney's duties required him to wait at the switch north of the track until the train had cleared, close the switch, return to his shanty near the crossing, and change the signals from red to green to permit trains on the Illinois Central tracks to use the crossing. The Frisco train cleared the switch, backing at the rate of 8 or 10 miles per hour. But the switch remained open and the signals still were red. Upon investigation Haney was found north of the track near the switch, face down on the ground, unconscious. An ambulance was called, but he was dead upon arrival at the hospital.

Haney had been struck in the back of the head, causing a fractured skull from which he died. There were no eye-witnesses to the fatal blow and nobody can know what hit him. Apparently he had fallen toward the south, with his head to the south, but his head was about 5½ feet north of the Frisco track, plainly out of reach of the train. There were marks indicating that his toes had dragged a few inches southward as he fell, plainly showing that the impulse of whatever blow struck him in the head had projected him toward the track and the train, instead of away from the track and the train, as would have been the case if the blow had been dealt by the train or some part of the train or an attachment to it. Yet, whatever struck him did not bring him close enough to the train to put him in contact with it.

The injury to Haney's head was evidenced by a gash about two inches long, from which the blood flowed. The back of his cap had a corresponding black mark about an inch and a half long and an inch wide, running at an angle downward to the right of the center of the back of the head. A spot of blood was later found at a point three or four feet north of the tracks, again beyond the reach of the moving train. The conclusion of an autopsy was that his skull was fractured by "some fast moving small round object." One of the examining doctors testified that such an object *might have been* attached to a train backing at the rate of 8 or 10 miles per hour, but he also admitted that the fracture might have resulted from

a blow from a pipe, or a club, or some similar round object in the hands of an individual.

The plaintiff's theory was that Haney was struck by the curled end or tip of a mail hook hanging down loosely on the outside of the mail car of the backing train. This curled end was 73 inches above the top of the rail, which was 7 inches high; that is, it was 80 inches, or 6 feet 8 inches, above the ground. There was no evidence that Haney was a man of 6 feet 8 inches or more in height so as to be able to be struck by this curled end of the mail hook. He was 67½ inches, or 5 feet 7½ inches, tall.

In an attempt to make it appear that the mail hook might have struck him in the back of the head, plaintiff introduced evidence that both east and west of the switch there was an uneven mound of cinders and dirt rising at its highest points 18 to 24 inches above the top of the rail. Witnesses differed as to how close the mound approached the rail, the estimates varying from 3 to 15 feet. If the mound had been 12 inches high at a point about a foot from the side of the mail car, and if Haney had been standing on the mound at this point, and all of this was pure speculation, he possibly could have been hit by the end of the mail hook, the exact point of contact depending upon the height of the mound at the particular point—if, in fact, he was standing on the mound at that point, of which there was no evidence.

The railroad's theory was that Haney had been murdered. It pointed to the estimates that the mound was 10 to 15 feet north of the rail, making it impossible for the mail hook end to reach a point of contact with Haney's head. Photographs in evidence showed that the ground was level north of the rail for at least 10 feet. It appeared in the evidence that many hoboes and tramps frequented the area at night in order to get rides on freight trains, by reason of which Haney carried a pistol to protect himself. The pistol was found loose under his body by those who came to his rescue. It was testified, however, that the pistol had apparently slipped out of his pocket or scabbard as he fell. His clothes were not disarranged, and there was no evidence of a struggle or fight. No rods, pipes or weapons of any kind, except Haney's own pistol, were found near the scene. His gold watch and diamond ring were still on him after he was struck. Six days later his unsoiled billfold was found on a high board fence about a block from the place where Haney was struck and near the point where he had been placed in the ambulance. It obviously could not have been knocked to that point by the force of the blow which killed him. It contained his social security card and other effects, but no money.

A verdict for $30,000 for the plaintiff was rendered by the jury, and judgment thereon was entered for the plaintiff by the trial court. On the above state of facts, the Supreme Court of Missouri, in *Lavender v. Kurn,* reversed, saying very properly:[74]

> A court should never withdraw a question from the jury unless all reasonable men

[74] 354 Mo. 196, 208, 189 S. W. 2d 253, 258-259 (1945).

in the honest exercise of a fair and impartial judgment would draw the same conclusion from the facts which condition the issue. *Courtney v. Ocean Accident & Guaranty Corporation,* 346 Mo. 703, 142 S. W. 2d 858, but it is well settled that verdicts may not be based on conjecture and speculation. *Hamilton v. St. Louis-San Francisco Ry. Co.,* 318 Mo. 123, 300 S. W. 787; *Mullen v. Lowden et al.,* 344 Mo. 40, 124 S. W. 2d 1152; *Lappin v. Prebe et al.,* 345 Mo. 68, 131 S. W. 2d 511; *Federal Cold Storage Co. v. Pupillo,* 346 Mo. 136, 139 S. W. 2d 996, *loc. cit.* 1001, and cases there cited. Also, it is well settled that a mere possibility of negligence is not a sufficient foundation for an inference of negligence which will justify submission of a case to a jury. *Mullen v. Lowden et al., supra,* 124 S. W. 2d *loc. cit.* 1156.

With the hearsay eliminated, we think that all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook, and we are constrained to rule that plaintiff failed to make a submissible case on that question. And we also rule that there was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney.

This was a perfectly sound decision and entirely in line with the law as announced by the Supreme Court of the United States in *Brady v. Southern Ry.* (320 U. S. 476), in which, as we have seen, the Court had recently held, at the October, 1943, term, that the evidence of an employer's negligence under the FELA must be more than a scintilla before the case can be properly left to the trier of the facts; that evidence sufficient to raise only a mere speculation or conjecture as to negligence of the defendant, or that such negligence was the proximate cause of injury or death, is not sufficient to support a verdict for the plaintiff; and that "Bare possibility is not sufficient."

However, on that state of facts, Mr. Justice Murphy, writing for the Supreme Court of the United States, in terms used the very language of speculation to reason that Haney might possibly have been struck by the mail hook. He again completely overlooked the fact that the burden was on the plaintiff to prove negligence and proximate cause. He speculated that the high point of the mound might have been close enough to the track for a man standing on it to have been struck by the mail hook. He speculated, in terms, that Haney might have been standing on such high point of the mound in such proximity to the track. He said that from the above evidence the jury might reasonably have inferred that the end of the mail hook struck Haney in the back of the head, in spite of the fact that Haney fell forward toward the track, instead of alongside or away from the track. He even speculated that Haney might well have been struck and "then wandered in a daze to the point where he fell forward." He authorized this form of pure speculation by the jury because of the difficulty of the facts (which he admitted), that "there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney" and that there were "facts from which it might reasonably be inferred that Haney was murdered."

In spite of this Mr. Justice Murphy said:[75]

[75] 327 U. S. at 652-653.

But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67-68; *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353-354; *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 35. See also Moore, "Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act," 29 Marquette L. Rev. 73.

This amazing statement, on its face, shows that Mr. Justice Murphy and the majority of the Supreme Court completely overlooked the burden of proof which rested on the plaintiff. It was not necessary, as the above quotation clearly implies it was, that a reviewing court "arrive at a conclusion opposite from the one reached by the jury." It was not necessary for a reviewing court to adopt the defendant's theory that Haney had been murdered. The burden was on the plaintiff to prove negligence and proximate cause. All that a reviewing court needed to do—and that the Supreme Court of Missouri did very precisely—was to find that plaintiff had not made out a case sufficient to go to the jury in support of his theory of the case, that his theory was based on pure speculation and conjecture and on not more than a scintilla of evidence.

Evidently Mr. Justice Murphy had at least some subconscious realization of the inconsistency of his above holding, for he undertook to answer the contention that the jury's verdict was based purely upon speculation and conjecture, saying:[76]

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

This opinion marked the low point in the long series of departures by the Supreme Court of the United States from the well-settled law of negligence. In express terms Mr. Justice Murphy himself speculated on the evidence. In express terms he held that the jury was authorized to speculate. This decision was squarely in conflict with the *Brady* case, and, yet, again, the opinion of the Court did not see fit even to refer to the *Brady* case.

As stated above, Chief Justice Stone and Mr. Justice Frankfurter did not concur in the opinion but only in the result. Mr. Justice Reed dissented. One of the soundest judges on the court, Mr. Justice Jackson, was still absent in Nuremberg and took no part in the consideration or the decision of the case.

[76] *Id.* at 653.

It will again be seen that the two decisions at the 1945 term were in favor of plaintiffs and against the railroads, and both of them widely departed from settled precedents in the law.

The Reaction of Lower Federal Courts, State Courts and the Bar to the Trend of Supreme Court Decisions

At this point, following the *Lavender* case, decided March 25, 1946, the lower federal courts, the state courts, and the bar of the country were all left in a complete quandary as to what had become of the well-settled principles of the law of negligence. In particular, the lower federal and state courts were in a helpless condition as to how to deal with FELA cases before them. If they applied the principles carefully reviewed and restated in the *Brady* case, and took a case from a jury, or reversed a jury verdict and trial court judgment, on the ground that, by all previously recognized judicial standards, plaintiff's evidence was insufficient to raise more than a speculation, guess or conjecture as to railroad negligence or proximate causation, they could only read the Supreme Court decisions since *Brady* as clearly indicating that they would be reversed if the case got to the Supreme Court.

On the other hand, if they let every speculative and conjectural theory of a plaintiff, on such non-probative evidence as that involved in the *Lavender* case, go to the jury and allowed a verdict for plaintiff to stand, they conscientiously felt that they were abdicating their judicial function. They could only read the recent cases, since *Brady* and through *Lavender*, as expressing a determination by the Supreme Court, led by Justices Black, Douglas, Murphy, and Rutledge, to abandon negligence and proximate cause as the prerequisites to liability under the FELA and to apply that Act as a workmen's compensation law, imposing liability without fault, and yet violating the whole basis of workmen's compensation laws by not fixing a definite schedule of limited compensation awards but still leaving "the sky the limit" for the generosity of juries with other people's money.[77]

This is no place to review the many expressions by other courts of the feeling of dismay and futility in which they were left by the Supreme Court decisions since the 1942 term. It is sufficient to give one dramatic example, so striking, and from such a source,[78] that it was not long in forcing itself upon the attention of the Supreme Court.[79]

In *Griswold v. Gardner*,[80] decided May 15, 1946, less than two months after the Supreme Court decision in the *Lavender* case, the Court of Appeals for the Seventh Circuit had before it an appeal in a case involving the death of a brakeman. The evidence was strikingly similar to that in the *Lavender* case, in that there was no showing as to how the deceased was killed and contentions as to railroad

[77] In an old case, Cashion v. Telegraph Co., 123 N. C. 267, 273, 31 S. E. 493, 494 (1898), the Supreme Court of North Carolina, in an opinion by Judge Douglas, had used a noteworthy expression: ". . . generosity is not a virtue when dealing with the property of others." Today courts seem only too glad to forget that earlier morality.

[78] Griswold v. Gardner, 155 F. 2d 333 (7th Cir. 1946).

[79] Wilkerson v. McCarthy, 336 U. S. 53, 61-62 (1949).

[80] 155 F. 2d 333 (7th Cir. 1946).

negligence and proximate causation were left to inference based on pure speculation and conjecture. Verdict and judgment had been rendered for plaintiff in the district court and the principal question on appeal was whether the evidence was sufficient for submission to the jury and to support the verdict and judgment based on a finding that the railroad's negligence proximately caused the death.

It is obvious that the majority of the Court of Appeals felt that the evidence was insufficient to raise more than a speculation or conjecture and that the verdict and judgment were unwarranted. However, they wrung their hands in helplessness, in view of the recent Supreme Court opinions, and affirmed the district court, against their own judicial judgment, under the impulsion of the Supreme Court decisions plainly authorizing and even encouraging speculation by juries in these cases. The opinion for the court, by Circuit Judge Major, so plainly reflected the feeling of futility in which lower federal courts were left by the line of cases ending with *Lavender* and so accurately summarized the effect on the law of negligence of those cases, that we quote from it *in extenso* as follows:[81]

> Any detailed review of the evidence in a case of this character for the purpose of determining the propriety of the trial court's refusal to direct a verdict would be an idle and useless ceremony in the light of the recent decisions of the Supreme Court. This is so regardless of what we might think of the sufficiency of the evidence in this respect. The fact is, so we think, that the Supreme Court has in effect converted this negligence statute into a compensation law thereby making, for all practical purposes, a railroad an insurer of its employees. (See dissent of Mr. Justice Roberts in Bailey v. Central Vermont Ry., 319 U. S. 350, 358, 63 S. Ct. 1062, 1066, 87 L. Ed. 1444.)
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> The Supreme Court, commencing with Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967, in a succession of cases has reversed every court (with one exception hereinafter noted) which has held that a defendant was entitled to a directed verdict. In the Tiller case, the Supreme Court reversed the Court of Appeals for the Fourth Circuit, 128 F. 2d 420, which had affirmed the District Court in directing a verdict. The case, upon remand, was again tried in the court below, where a directed verdict was denied. For this denial the Court of Appeals reversed and again the Supreme Court reversed the Court of Appeals, holding that the District Court properly submitted the case to the jury. In Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, this court reversed the District Court on account of its refusal to direct a verdict, and our decision, 134 F. 2d 860, was reversed by the Supreme Court. In Bailey v. Central Vermont Ry., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, the Supreme Court of Vermont held that there should have been a directed verdict for the defendant, and the Supreme Court reversed the decision of that court. In Blair v. Baltimore & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, the Supreme Court reversed the Supreme Court of Pennsylvania which had held that there should have been a directed verdict. In the recent case of Lavender, Administrator, etc., v. Kurn et al., 66 S. Ct. 740, the Supreme Court reversed the Supreme Court of Missouri which had held that there should have been a directed verdict for each of the defendants.
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> The only exception to this unbroken line of decisions is Brady v. Southern R. Co., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239, where the Supreme Court of North Carolina was affirmed in its holding that there should have been a directed verdict. This ex-

[81] *Id.* at 333-334.

ception, however, is of little consequence in view of the fact that four members of the court dissented.

The case of Lavender v. Kurn, supra, the latest decision of the Supreme Court under the Federal Employers Liability Act, leaves little room for doubt but that a directed verdict by a trial court or a holding by any court sustaining a directed verdict will not meet with favor, even though the verdict involves speculation and conjecture. In the Lavender case, the Missouri Supreme Court, 189 S. W. 2d 253, 259, held: ". . . that it would be mere speculation and conjecture to say that Haney was struck by the mail hook, and we are constrained to rule that plaintiff failed to make a submissible case on that question." In response to this holding the Supreme Court states [66 S. Ct. 744]: "It is no answer to say that the jury's verdict involves speculation and conjecture." A reading of the facts of that case, both as related by the Supreme Court and the Supreme Court of Missouri, reveals very clearly that the jury's verdict as to the cause of decedent's death, especially as it applies to the Illinois Central Railroad, amounted to nothing more than a guess on its part.

That the Supreme Court treats the question of negligence and proximate cause as a jury question in this class of cases is clearly shown by a study of these cases. Moreover, not only are these issues to be decided by the jury but its decision is unassailable. In fact, it is difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict.

District Judge Lindley dissented from the affirmance, saying, *inter alia*:[82]

> I think the evidence here reflects no proof of an unreasonably unsafe place to work. It seems to me that defendant has never had a trial upon the true issue, namely that alleged in plaintiff's declaration of negligent operation of cars and failure to keep lookout or give a warning. Indeed, the trial proceeded upon a false issue unsupported by any evidence. I would reverse the judgment for a new trial.

Circuit Judge Kerner concurred in the result of the affirmance but would not go along with the criticism of the Supreme Court contained in Judge Major's opinion. He said:[83]

> I concur in the result reached and the legal propositions announced. I do not agree, however, that the Supreme Court has converted the Federal Employers' Liability Act into a compensation law and has made a railroad an insurer of its employees.

This statement was purely negative. He did not say what he thought the Supreme Court *had done* to the law of negligence by its recent decisions. He was less frank but more deferential to the Supreme Court than Judge Major.

It is worthy of note that at the time of this decision Judge Sherman Minton, soon to be appointed to the Supreme Court, was a member of the Court of Appeals for the Seventh Circuit, although he did not sit on this particular case.

The 1946 Term

At the October Term, 1946, the Supreme Court returned to its trend in favor of plaintiffs, with Mr. Justice Black and the *bloc* of four in charge.

In *Jesionowski v. Boston & Maine R. R.*,[84] Mr. Justice Black, in an opinion for the Court, considerably liberalized the doctrine of *res ipsa loquitur* so as to make

[82] *Id.* at 338. [83] *Id.* at 337. [84] 329 U. S. 452, decided Jan. 13, 1947.

it more favorable to plaintiffs. Mr. Justice Reed, Mr. Justice Jackson, who had returned from Nuremberg, and Mr. Justice Burton, the sole Republican on the Bench, who had been appointed by President Truman on September 18, 1945, and seated on the Court on October 1, 1945, dissented on the ground that the decision of the Court of Appeals for the First Circuit, below, had correctly applied the rule of *res ipsa loquitur* and that its judgment should be affirmed.

We should note that at this time Chief Justice Vinson had succeeded Chief Justice Stone, so that the majority of the Court, with Mr. Justice Black, included Chief Justice Vinson and Justices Frankfurter, Douglas, Murphy, and Rutledge.

The *Jesionowski* case was an action for damages for the death of a brakeman whose duty it was to throw a switch before a train of four cars pushed backward by an engine reached that switch, in order that the four cars would take the siding. There was evidence that he threw the switch and gave the signal to the engineer to back the cars. The Court's opinion admitted that the railroad's evidence was sufficient to authorize, but not compel, the jury to find that the deceased negligently threw the switch while the lead car in the backward movement straddled the switch, with one set of the car wheels on one side of the switch and one on the other. If true, this would mean that the wheels east of the switch would move down the main line and the others would enter the siding when the switch was thrown, causing the derailment in which the brakeman was killed. The opinion admitted that, if the jury had believed the railroad's evidence that the last car was astride the switch when it was thrown, it would have been authorized, under the trial court's charge, to find for the railroad.

There was some speculative evidence that, if a frog about 75 feet east of this switch, operated by a spring mechanism, had failed to work when the wheels passed over it, that might cause a derailment. Some planks and splinters were found on the track either close to the switch or close to the frog, as to which the evidence was in dispute. It appeared that the frog and switch had been in good condition before the derailment and after the derailment, and that cars had been operated and the tracks had been similarly used previously without any similar mishap.

The Court of Appeals for the First Circuit reversed a judgment on a verdict for the plaintiff,[85] holding that the trial court erred in submitting the case to the jury under the doctrine of *res ipsa loquitur*. It held that that doctrine has rigidly defined prerequisites, one of which is that to apply it the defendant must have exclusive control of all the things used in an operation which might probably have caused injury. It pointed out that here the railroad did not have exclusive control of all such factors since the deceased had immediate control over the switching and signalling. Mr. Justice Black, for the majority of the Supreme Court, disagreed. He said that this viewpoint unduly restricted the power of juries to decide questions of fact. He referred to the opinion of the Court of Appeals as embodying "a conceptualistic interpretation of *res ipsa loquitur*," which unduly narrowed the doctrine as applied by the Supreme Court. His position was that once a jury, having been

[85] 154 F. 2d 703 (1st Cir. 1946).

appropriately instructed, finds that the employee's activities did not cause the derailment, the railroad remained as the exclusive controller of all the factors which may have caused the accident. By this means he held that the jury was authorized to find negligence from the mere fact that the accident occurred.

In *Ellis v. Union Pacific R. R.*,[86] the Court, in an unanimous decision, opinion by Mr. Justice Douglas, reversed a judgment of the Supreme Court of Nebraska, which had reversed a judgment on a jury verdict for plaintiff for insufficiency of evidence to show negligence. The Supreme Court held that that decision was in conflict with the *Lavender* case.

It is unnecessary here to review the facts. This writer cannot assert that the Supreme Court's decision was wrong, but only that it was fairly debatable. The interesting thing is that in the opinion the Court, for the first time, returned to its decision in the *Brady* case and relied on that case as a controlling precedent. Mr. Justice Douglas, who had joined the dissenters in the *Brady* case, said:[87]

> The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be "in whole or in part" the cause of the injury. 45 U. S. C. §51; *Brady v. Southern R. Co.*, 320 U. S. 476, 484. Whether those standards are satisfied is a federal question, the rights created being federal rights. *Brady v. Southern R. Co.*, supra; *Bailey v. Central Vermont R. Co.*, 319 U. S. 350.

Perhaps Mr. Justice Douglas had read the criticism by Judge Major, of the Seventh Circuit Court of Appeals, of the Supreme Court's decisions since *Brady*. In any case he returned to that case and reaffirmed it. But in the instant case he reversed the Nebraska court on the ground that the evidence was controverted and sufficient to support the verdict, under the doctrine of the *Lavender* case.

In *Myers v. Reading Co.*,[88] the unanimous Court, opinion by Mr. Justice Burton, reversed a decision of the Court of Appeals for the Third Circuit, which had affirmed a district court's entry of judgment for defendant, notwithstanding jury verdict for plaintiff. It held that the evidence was sufficient to warrant the jury in holding the defendant railroad liable under the FELA and the Safety Appliance Acts. This time, interestingly enough, the Supreme Court cited, reaffirmed, and relied upon both the *Brady* case and the *Lavender* case and left other courts and the bar still to speculate as to what the law was as between those two wholly inconsistent cases.

At the 1946 term no railroad won a case. All three decisions were in favor of plaintiffs. But the Court, in terms, had reaffirmed the *Brady* case, without recognizing however any inconsistency between it and the *Lavender* case, which also was reaffirmed.

The 1947 Term

At the October Term, 1947, the Supreme Court developed a new technique in favor of plaintiffs who had lost in lower courts. That was to grant the losing

[86] 329 U. S. 649, decided Feb. 3, 1947.
[87] *Id.* at 653.
[88] 331 U. S. 477, decided June 2, 1947.

plaintiff's petition for certiorari and, on that petition and the brief in support thereof, to reverse by *per curiam* opinion, without hearing the railroad on argument.

This was done in *Lillie v. Thompson*.[89] The Court did not even note appearances for the respondent railroad. It held that the evidence was sufficient to go to the jury, with no discussion of precedents except to cite the *Restatement of the Law of Torts* in a footnote. No plaintiff or plaintiff's counsel could complain of that technique.

Callen v. Pennsylvania R. R.,[90] is not within the scope of this paper, because it only involved the question of the validity of a release.

In *Anderson v. Atchison, T. & S. F. Ry.*,[91] the Court again resorted to its new technique and merely on the certiorari papers, and without hearing or argument, reversed the Supreme Court of California, which had affirmed a trial court judgment for the railroad on a holding that plaintiff's complaint did not state a cause of action under the FELA. It held that a complaint was sufficient which alleged that a conductor disappeared from a moving train in very cold weather at a time when his duty required his presence on the rear vestibule, that his absence was discovered by other trainmen, that they negligently failed to make prompt efforts to have him rescued, and that he died from the resulting exposure.

The *per curiam* opinion cited and relied on the *Tiller, Bailey, Blair,* and *Lillie* cases but made no mention of the *Brady* case.

The 1948 Term

At the October Term, 1948, for the first time in five years, since the *Brady* case in 1943, a railroad won an FELA case in the Supreme Court, *Eckenrode v. Pennsylvania R. R.*,[92] by a *per curiam* opinion. The *bloc* of Justices Black, Douglas, Murphy, and Rutledge of course dissented.

A district court set aside a verdict for the plaintiff and entered judgment for the railroad. The Court of Appeals for the Third Circuit affirmed, and after a rehearing again affirmed, one judge dissenting.[93]

The Supreme Court, affirming that judgment, merely said:[94]

> There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part, to Eckenrode's death? Upon consideration of the record, the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sustain a recovery for her. Accordingly, the judgment is *Affirmed*.

That was helpful and no doubt entirely satisfactory to the Pennsylvania Railroad. It was not very illuminating to other railroads or their counsel, or to other courts, as to what was left of the old law of negligence. The Court of Appeals set out the facts in evidence in this case (164 F. 2d at 998-999), and they were hardly as speculative as to railroad negligence as were the facts in the *Lavender* case (327

[89] 332 U. S. 459, decided Nov. 24, 1947.
[90] 332 U. S. 625, decided Jan. 12, 1948.
[91] 333 U. S. 821, decided April 26, 1948.
[92] 335 U. S. 329, decided Nov. 15, 1948.
[93] 164 F. 2d 996 (3d Cir. 1947).
[94] 335 U. S. at 330.

U. S. 645). Nevertheless the case was highly important as the first break in a five-year uniform trend of decisions against railroads and left some hope that a railroad, in a proper case, might have a bare chance of getting a five-to-four decision in its favor. Nothing has ever indicated any hope of any railroad in any FELA case, however meritorious, getting a single vote in its favor from the *bloc* of Justices Black, Douglas, Murphy, and Rutledge. Not one of them has ever, to the present writing, joined in a judgment in favor of a railroad in any case under the FELA.

In *Coray v. Southern Pacific Co.*,[95] the Court, in a unanimous decision, opinion by Mr. Justice Black, reversed the Supreme Court of Utah, which had[96] affirmed a trial court in directing a verdict for the railroad. The Supreme Court held that the undisputed evidence established that the employee was killed when a motor-driven track car, on which he was following a train, crashed into the train when it stopped suddenly and unexpectedly because of a defective air-brake appliance. On such facts it was held that a case was made for the jury under the Safety Appliance and Employers' Liability Acts. The state courts had held that the protection of the Safety Appliance Act's requirement as to air-brakes on the train did not cover and protect an employee on the following motor car. The Supreme Court disagreed.

By the time of the next case, *Wilkerson v. McCarthy*,[97] it is clear that not only Mr. Justice Douglas but all the other members of the Court had read the opinion by Judge Major of the Seventh Circuit in *Griswold v. Gardner*, containing his criticism of the recent trend of Supreme Court decisions, since the Supreme Court, in the *Wilkerson* case, made a considerable point of undertaking to answer that criticism.

In the *Wilkerson* case the Court, by a seven-to-two decision, opinion for the Court by Mr. Justice Black, separate dissenting opinions by Chief Justice Vinson and by Mr. Justice Jackson, reversed the Supreme Court of Utah, which had affirmed[98] a district court's direction of a verdict for the defendant railroad. The facts were complicated and the evidence presented a close and debatable question as to whether it was sufficient to go to the jury and to support a verdict in favor of the plaintiff. Mr. Justice Black said that the opinion of the Utah Supreme Court strongly indicated, as the dissenting judge on that court pointed out, that its affirmance of direction of verdict for the defendant rested on that court's independent resolution of conflicting testimony. He held that that was contrary to the Supreme Court's decisions in the *Lavender*, *Bailey*, and *Tiller* cases. He cited *Brady v. Southern Ry.* under the rubric "and see." We need not here detail the evidence. It is sufficient for our purposes that the majority of the Court thought that it was sufficient to support a verdict for the plaintiff, whereas Chief Justice Vinson and Mr. Justice Jackson vigorously asserted that there was no evidence, nor any inference which reasonably might be drawn from the evidence, when viewed in the light most favorable to the plaintiff, which could sustain a verdict for him.

[95] 335 U. S. 520, decided Jan. 3, 1949.
[96] 185 P. 2d 963 (1947).
[97] 336 U. S. 53, decided Jan. 31, 1949.
[98] 187 P. 2d 188 (1947).

The interesting feature of the case lies in the efforts which the Court made to defend itself against widespread suggestions, and in particular the suggestion of Judge Major, that the Supreme Court's recent decisions under the FELA had changed that act from a negligence act to an act in the nature of a workmen's compensation act, imposing liability regardless of fault. Addressing himself to this question, Mr. Justice Black, in the opinion of the Court, said:[99]

> Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. *Cf. Coray v. Southern Pac. Co.*, 335 U. S. 520. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a jury should hold a master "liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances," bearing in mind that "the standard of care must be commensurate to the dangers of the business." *Tiller v. Atlantic C. L. R. Co.*, 318 U. S. 54, 67.
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> There are some who think that recent decisions of this Court which have required submission of negligence questions to a jury make, "for all practical purposes, a railroad an insurer of its employees." See individual opinion of Judge Major, *Griswold v. Gardner*, 155 F. 2d 333, 334. But see Judge Kerner's dissent from this view at p. 337 and Judge Lindley's dissenting opinion, pp. 337-338. This assumption, that railroads are made insurers where the issue of negligence is left to the jury, is inadmissible. It rests on another assumption, this one unarticulated, that juries will invariably decide negligence questions against railroads. This is contrary to fact, as shown for illustration by other Federal Employers' Liability cases, *Barry v. Reading Co.*, 147 F. 2d 129, cert. denied, 324 U. S. 867; *Benton v. St. Louis-San Francisco R. Co.*, 182 S. W. 2d 61, cert. denied, 324 U. S. 843. And *cf. Bruner v. McCarthy*, 105 Utah 399, 142 P. 2d 649, cert. dismissed for reasons stated, 323 U. S. 673. Moreover, this Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence: "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." *Jones v. East Tennessee R. Co.*, 128 U. S. 443, 445. And peremptory instructions should not be given in negligence cases "where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences." *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 572. Such has ever since been the established rule for trial and appellate courts. See *Tiller v. Atlantic C. L. R. Co.*, 318 U. S. 54, 67, 68. Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed questions on whim, this Court, speaking through Mr. Justice Holmes, said: "But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved." *Aikens v. Wisconsin*, 195 U. S. 194, 206.

Mr. Justice Frankfurter concurred in a separate opinion in which he stressed the fact that it is the trial judge's function to determine whether the evidence in its entirety would rationally support a verdict for the plaintiff, assuming that the jury

[99] 336 U. S. at 61-63.

took, as it would be entitled to take, a view of the evidence most favorable to the plaintiff. But he pointed out that there is no bright line dividing negligence from non-negligence, that questions of negligence are questions of degree, often very nice differences of degree, and that judges of competence and conscience in the past have disagreed, and in the future will disagree, on such questions. Having made these observations, he asserted that the difficulties in these cases derive largely from what he called "the outmoded concept of 'negligence' as a working principle for the adjustments of injuries inevitable under the technological circumstances of modern industry." He went further and asserted his own view that this is a cruel and wasteful mode of dealing with industrial injuries and that it has long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws. He added:[100]

> It is, of course, the duty of courts to enforce the Federal Employers' Liability Act, however outmoded and unjust in operation it may be. But so long as negligence rather than workmen's compensation is the basis of recovery, just so long will suits under the Federal Employers' Liability Act lead to conflicting opinions about "fault" and "proximate cause." The law reports are full of unedifying proof of these conflicting views, and that too by judges who seek conscientiously to perform their duty by neither leaving everything to a jury nor, on the other hand, turning the Federal Employers' Liability Act into a workmen's compensation law.

Upon these observations and upon his study of the present case and previous cases under the Act, Mr. Justice Frankfurter drew the conclusion that the Supreme Court ought not to grant certiorari in any of these cases that involves no more than its particular facts. He thought this had appeared to be the situation in the *Wilkerson* case and that the petition for certiorari ought to have been dismissed. He expressed a serious concern because this was "the thirtieth occasion in which a petition for certiorari has been granted during the past decade to review a judgment denying recovery under the Federal Employers' Liability Act in a case turning solely on jury issues." He thought the Supreme Court, in view of the mounting burden of its business, ought to relieve itself of cases of this class.

Mr. Justice Burton, having concurred in the Court's opinion, also joined in Mr. Justice Frankfurter's opinion.

Mr. Justice Douglas filed a separate concurring opinion, which he introduced by saying: "While I join in the opinion of the Court, I think it appropriate to take this occasion to account for our stewardship in this group of cases." He declared that the FELA was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. He admitted that not all these costs were imposed, for the Act did not make the employer an insurer; that the liability which it imposed was only the liability for negligence. However, he expressed the view that that purpose had not been given a friendly reception in the courts.[101] He asserted that the Supreme Court itself had led the

[100] *Id.* at 66.

[101] Citing, particularly, Seaboard Air Line v. Horton, 233 U. S. 492 (1914); Toledo, St. L. & W. R. R. v. Allen, 276 U. S. 165 (1928); and the review of the cases in Tiller v. Atlantic Coast Line R. R., 318 U. S. 54, 62-67 (1943). 336 U. S. at 69.

way in overturning jury verdicts rendered for employees.[102] "And so it was," he asserted, "that a goodly portion of the relief which Congress had provided employees was withheld from them."

Mr. Justice Douglas then proceeded to attempt a further answer to the charge that the Supreme Court had converted the Liability Act into a Workmen's Compensation Act. He himself undertook a review of the cases coming to the Supreme Court from the 1943 term to the 1948 term, setting that review out in a list published as an appendix[103] to his opinion, which, he said, shows a record more faithful to the design of the Act than previously prevailed.

The defect in his appendix is that he padded it with long lists of cases in which the Supreme Court had merely denied certiorari, although the Supreme Court has always held that denial of certiorari is no decision on the merits of a case and is not to be taken as a precedent on the merits.

Eliminating these mere denials of certiorari, his analysis of the decisions since 1943 corresponds entirely with our analysis in this paper, in showing that every case had been decided against the railroad and in favor of the plaintiff except the *Brady* case and the *Eckenrode* case, with the one exception that he also listed *Hunter v. Texas Electric Ry. Co.*,[104] which was a mere *per curiam* opinion in favor of the defendant, not showing what question was in issue and not even showing that the FELA was involved, but showing that Justices Black, Douglas, Murphy, and Rutledge had dissented.

In a separate dissenting opinion, Mr. Justice Jackson differed with the Court's opinion and with Mr. Justice Douglas' separate concurring opinion, saying:[105]

> This Court now reverses and, to my mind at least, espouses the doctrine that any time a trial or appellate court weighs evidence or examines facts it is usurping the jury's function. But under that rule every claim of injury would require jury trial, even if the evidence showed no possible basis for a finding of negligence. Determination of whether there could be such a basis is a function of the trial court, even though it involves weighing evidence and examining facts. I think we are under a duty to examine the record impartially if we take such cases and to sustain the lower courts where, as here, a finding of negligence would obviously be without basis in fact.
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> I am not unaware that even in this opinion the Court continues to pay lip service to the doctrine that liability in these cases is to be based only upon fault. But its standard of fault is such in this case as to indicate that the principle is without much practical meaning.

Mr. Justice Jackson then proceeded to demonstrate in inimitable fashion that there was no sufficient evidence of negligence in the *Wilkerson* case, and to that demonstration we invite the reader's consideration. He then added:[106]

> If in this class of cases, which forms a growing proportion of its total, this Court really is applying accepted principles of an old body of liability law in which lower courts

[102] Citing Chicago, M. & St. P. R. R. v. Coogan, 271 U. S. 472 (1926); Missouri Pac. R. R. v. Aeby, 275 U. S. 426 (1928); and New York Central R. R. v. Ambrose, 280 U. S. 486 (1930). 336 U. S. at 69.

[103] 336 at 71-73.

[104] 332 U. S. 827 (1947).

[105] 336 U. S. at 75-76.

[106] *Id.* at 76.

are generally experienced, I do not see why they are so baffled and confused at what goes on here. On the other hand, if this Court considers a reform of this law appropriate and within the judicial power to promulgate, I do not see why it should constantly deny that it is doing just that.

The last statement by Mr. Justice Jackson is accepted as the basic text of this paper, without further elaboration by the present writer.

In *Reynolds v. Atlantic Coast Line R. R.*,[107] by a *per curiam* opinion, the Supreme Court affirmed the Supreme Court of Alabama in a holding that a cause of action under the FELA was not stated by a complaint which merely alleged that the defendant railroad's negligence caused the deceased employee to perform additional work of the same kind he normally performed, without alleging that this additional work contained any hazards other than those usual to the occupation.

Even in this plain case the *bloc* of Justices Black, Douglas, Murphy and Rutledge dissented.

Mr. Justice Frankfurter was of the opinion that the certiorari should not have been granted, in line with his separate opinion in the *Wilkerson* case.

The 1948 Term ended, as far as this class of cases is concerned, with an epoch-making decision, Mr. Justice Rutledge writing for the majority, Justices Frankfurter, Reed, Jackson, and Burton concurring only in part, in the case of *Urie v. Thompson*,[108] holding, for the first time, that the coverage of the FELA and of the Boiler Inspection Act is not confined to injuries resulting from accidents, but includes injuries in the nature of occupational diseases, such as silicosis. The concurring justices agreed with this holding in so far as concerns "injuries" as used in the FELA, but disagreed as to "accidents" as used in the Boiler Inspection Act.

The majority, however, went the whole way as to both acts and also held that the fact that the plaintiff's contraction of silicosis resulted from the inhalation of silica dust over a period of thirty years, so that he may have had silicosis without knowing it for more than three years before he brought his suit, did not bar his claim under the FELA, when the time which elapsed between his discovery of his condition and the filing of suit did not exceed three years.

This case is not strictly within the coverage of this paper. It did not deal as such with the law of negligence. The opinion by Mr. Justice Rutledge assumed that the occupational disease of silicosis would only be within the coverage of the FELA if caused by railroad negligence. As to the Boiler Inspection Act, however, he held that negligence need not be proved, that any violation of ICC rules under that Act which caused an engineer to contract silicosis was compensable in spite of the fact that the Boiler Inspection Act in terms only covered "accidents," not "injuries" as did the FELA. It was specifically held that the coverage of the Boiler Inspection Act, as applied to occupational diseases, was no narrower than that of the FELA, although the former imposed an absolute liability not dependent on proof of negligence.

[107] 336 U. S. 207, decided Feb. 14, 1949.
[108] 337 U. S. 163, decided May 31, 1949.

The great significance of the case was that it was one of novel impression and opened up a wholly new field of coverage of occupational diseases under the two acts.

In his opinion, "concurring in part," joined in by Justices Reed, Jackson, and Burton, Mr. Justice Frankfurter again went out of his way to refer to the FELA as "an antiquated and uncivilized basis for working out rights and duties for disabilities and deaths inevitably due to the conduct of modern industry." That his view be not abridged, his opinion is quoted as follows:[109]

> At the risk of wearisome reiteration it is relevant to say again that the common law concept of negligence is an antiquated and uncivilized basis for working out rights and duties for disabilities and deaths inevitably due to the conduct of modern industry. In the conscious or unconscious endeavor not to have the human cost of industry fall with cruel injustice upon workers and their families, the law of negligence gives rise to endless casuistry. So long as the gamble of an occasional heavy verdict is not replaced by the security of a modern system of insurance, courts must continue to apply the notion of negligence in situations for which it was never intended. Therefore, if a claim is made that an injury is causally related to a carrier's failure to maintain standards of care appropriate for employment on a railroad, the Federal Employers' Liability Act entitles an employee to establish that claim to a jury's satisfaction. Damages are recoverable under that Act for suffering "injury." That term, it seems to me, is sufficiently broad to include bodily injury which nowadays is more specifically characterized as "occupational disease." Accordingly, I agree that recovery may be had under the Federal Employers' Liability Act for silicosis, where the facts sustain such a claim, as is illustrated by the case of *Sadowski v. Long Island R. Co.*, 292 N. Y. 448, 55 N. E. 2d 497.
>
> On the other hand, I agree with the Missouri Supreme Court that occupational diseases cannot be fitted into the category of "accidents" for which the Boiler Inspection Act devised a scheme of regulation and a basis of liability. 36 Stat. 913, as amended, 45 U. S. C. §§22-34. I think I appreciate the humane impulse which seeks to bring occupational diseases within such a regime. But due regard for the limits of judicial interpretation precludes such free-handed application of a statute to situations outside its language and its purpose. To do so, moreover, is, I believe, a disservice to the humane ends which are sought to be promoted. Legislation is needed which will effectively meet the social obligations which underlie the incidence of occupational disease. See National Insurance (Industrial Injuries) Act, 1946, 9 & 10 Geo. 6, 488, particularly Part IV. The need for such legislation becomes obscured and the drive for it retarded if encouragement is given to the thought that there are now adequate remedies for occupational diseases in callings subject to Congressional control. The result of the present decision is to secure for this petitioner the judgment which the jury awarded him. It does not secure a proper system for dealing with occupational diseases.

The 1949 Term

Two deaths between the 1948 and the 1949 Terms, that of Mr. Justice Murphy, on July 19, 1949, and that of Mr. Justice Rutledge, on September 10, 1949, broke up the *bloc* of four justices who had always stood together against railroads and in favor of plaintiffs in these cases. They were succeeded on the Court respectively by Mr. Justice Clark and Mr. Justice Minton.

[109] *Id.* at 196-197.

The first FELA case at the 1949 Term, *Boyd v. Grand Trunk Western R. R.*,[110] did not deal with the law of negligence. It held, in a *per curiam* opinion, that an agreement between a railroad and an employee injured by its negligence, which limits the venue of any action thereafter brought by the employee under the Act, deprives him of his right to bring an action in any forum authorized by the Act and is void.

In the next case, *Brown v. Western Ry. of Alabama*,[111] Mr. Justice Black led the majority of the Court, indeed with no help from Mr. Justice Douglas, who took no part in the consideration or decision of the case. Justices Frankfurter and Jackson dissented. The split was over an interesting question as to whether a state court of Georgia, by giving effect to a general principle of pleading uniformly enforced in that state, had legitimately given force to a "procedural" rule of that state or had cut deeper than procedure and had impaired the plaintiff's "substantive" right under the FELA.

The state court sustained a general demurrer to plaintiff's complaint under the FELA which merely alleged that plaintiff was injured while in the performance of his duties when he stepped on a large clinker lying alongside the track in the railroad yard. It held that the mere presence of a large clinker in a railroad yard could not be said to constitute an act of negligence and that, so far as the allegations of the complaint showed, the sole cause of the accident was the act of the plaintiff in stepping on this large clinker, which he was able to see and could have avoided. The state court reached those conclusions by following a Georgia rule of practice to construe pleading allegations "most strongly against the pleader."[112]

Mr. Justice Black, for the majority of the Supreme Court, held that this construction of the pleading was not binding on his Court. He recognized, as did the dissenters, that it is troublesome to find the line between procedural and substantive rights, but he held that the Supreme Court will construe a complaint under the FELA most favorably in favor of the plaintiff and that "strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws." Accordingly the Court reversed the Georgia court. But it carefully limited its opinion to reversal so that plaintiff could have a trial on his complaint, cautioning that upon such a trial "the evidence offered may or may not support inferences of negligence."

It is interesting that Mr. Justice Black cited[113] *Brady v. Southern Ry.* (320 U. S. 476, 479), in support of his holding that "Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved."

The dissenters, Justices Frankfurter and Jackson, thought that the Georgia court had not disrespected the law of the land; that, while Georgia's rule of pleading

[110] 338 U. S. 263, decided Nov. 7, 1949.
[111] 338 U. S. 294, decided Nov. 21, 1949.
[112] Brown v. Western Ry. of Alabama, 77 Ga. App. 780, 49 S. E. 2d 853 (1948).
[113] 338 U. S. 299.

might have reflected "something of the pernicketiness with which seventeenth-century common law read a pleading," nevertheless that was not a denial of a federal right, especially where the state rule of pleading was uniformly enforced in actions in the state courts. They said that this particular plaintiff had chosen the Georgia courts as a forum, with full knowledge of the niceties of pleading required by Georgia, had not amended his complaint, but had elected to stand on his complaint against a general demurrer, and that the Georgia court could not fairly be said to have deprived him of a substantive federal right.

It is the view of this writer that the dissenting opinion might as soundly have been the opinion of the Supreme Court as the majority opinion. In this close case the trend in favor of liberalizing the law in favor of plaintiffs continued.

In *O'Donnell v. Elgin, J. & E. Ry.*,[114] Mr. Justice Jackson, surprisingly enough, in his opinion for the majority, shocked railroad lawyers by doing what can only be described as rewriting the Automatic Coupler Act[115] to make it apply to something which Congress clearly had not condemned. Mr. Justice Jackson is not much given to the practice of judicial legislation, rewriting acts of Congress, and he has often spoken out against it in vigorous terms. Yet, just as even Homer nods, he nodded in this case and wrote new language into the Act.

Justices Frankfurter, Douglas, and Minton took no part in the consideration or decision of the case. Justices Reed and Burton dissented. So the case was really shocking to railroad lawyers, since an actual minority of four justices of the Court rewrote the statute to take care of this plaintiff's case.

The only requirement Congress had made in the statute was to prohibit railroads using cars "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." That was all Congress said in the Act. That was a severe enough requirement, in all good conscience, carrying its absolute liability for any breach regardless of negligence, because science has never been able to devise any such coupler which will always couple automatically by impact, as all railroad mechanical men and all railroad lawyers know. The finest coupler that science has been able to produce sometimes will couple automatically on impact and sometimes will not. Often a half dozen or more tries have to be made before the best coupler will couple automatically on impact, especially if the impact takes place on a curve.

Not content with that severe and often impossible requirement, the minority of four members of the Court added to the statute a requirement in terms, not enacted by Congress, that the cars must be equipped with couplers that "will remain coupled until set free by some purposeful act of control."[116] The dissenters pointed out that Congress might have so legislated but that it did not do so.

O'Donnell met an unwitnessed death while working in defendant's yard as a member of its switching crew. When last seen, he was going to adjust the couplers

[114] 338 U. S. 384, decided Dec. 12, 1949.
[115] 27 STAT. 531 (1893), 45 U. S. C. §2 (1946).
[116] 338 U. S. 384, 389.

on certain cars which previously had failed to couple by impact. Shortly after his departure, as the result of the breaking of a coupler, two cars broke loose from a cut of cars that was being moved in a switching operation. Running free, they collided with other standing cars and drove them against those whose couplers decedent had said he was going to adjust. That he had gone between them to adjust couplers was suggested by the fact that they actually coupled upon impact with the colliding cars, though they previously had failed to do so.

The Court's opinion concerned itself only with the effect accorded by the trial court's instructions to the breaking of the coupler which let loose the two cars. The trial court refused to instruct that a breaking of the coupler was negligence *per se* or a violation of the statute. The Court of Appeals for the Seventh Circuit sustained this refusal, saying,[117]

> . . . we do not believe the Act required defendant to furnish couplers that would not break. We think the true rule is that where a coupler does break, the jury may, if they think it reasonable under all the circumstances, infer that the coupler was defective and was furnished and used in violation of the Act. The cases go no further than to hold that from the breaking of a coupler the jury may infer negligence.

Mr. Justice Jackson and the three other members of the Court who joined him disagreed and reversed. He admitted that[118] "A close and literal reading of the . . . Act . . . suggests that two functions only are required of couplers: that they couple automatically by impact and that they uncouple without requiring men to go between the ends of the car." It will be seen that this absolutely was the only requirement of the Act. Mr. Justice Jackson admitted that "this construction finds some support in the decisions." Instead of "some support" he cited four decisions of the Supreme Court and four from district courts or federal courts of appeals. But he said that courts at other times have held that failure of couplers to remain coupled until released constitutes or evidences a violation of the Act, citing some nine cases in lower federal and state courts. "This appears," he said, "also to have been the view of this Court in the only case of this nature ever before it. *Minneapolis & St. Louis R. Co. v. Gotschall*, 244 U. S. 66."

To rewrite the statute, Mr. Justice Jackson plainly gave attention to what he thought Congress ought to have done, rather than to what it did do, in writing the safety statute. He said:[119]

> It is hard to think of a coupler defect in which greater danger inheres to workmen, travelers and all to whom the railroad owes a duty, than one which sets cars running uncontrolled upon its tracks. We find it difficult to read[120] the Safety Appliance Act to require that cars be equipped with appliances which couple automatically by impact and which may be released without going between the end of cars, but which need not remain coupled in the meantime. The Act so construed would guard against dangers incident to effecting an engagement or disengagement while ignoring the even greater hazards

[117] 171 F. 2d 973, 976 (7th Cir. 1948).
[118] 338 U. S. at 387-388.
[119] *Id.* at 388-389.
[120] Obviously meaning "we do not like to read. . . ."

which can result from the failure of a coupling to perform its main function, which is to stay coupled until released.

That was an appropriate reasoning to submit to Congress in support of an amendment of the statute. It was hardly a competent inducement to the Court to rewrite the statute by adding to it what Congress did not write into it, as Mr. Justice Jackson did in the next sentence of his opinion, "We hold that the Safety Appliance Act requires couplers which, after a secure coupling is effected, will remain coupled until set free by some purposeful act of control."

This case left railroads and railroad lawyers to speculate, not only as to how much further the Supreme Court was going in rewriting the common law of negligence, but also as to how much further it was going in rewriting acts of Congress, in favor of plaintiffs.

The decision in the *O'Donnell* case was given further point for plaintiffs and further dangers for railroads by the decision in the next case, *Carter v. Atlanta & St. A. B. Ry.*,[121] decided the next week, December 19, 1949, which held that the duty imposed by the coupler provision of the Safety Appliance Act is an absolute duty unrelated to negligence, and that the absence of a "defect" in a coupler cannot aid the railroad if the coupler was properly set and failed to couple automatically by impact. Mr. Justice Clark wrote the opinion for the Court, reversing the Court of Appeals for the Fifth Circuit which had affirmed the district court in taking away from the jury that phase of the case on its view that there was no evidence to establish any causal connection between the failure of the coupler to couple and the injuries suffered by the plaintiff.[122]

Mr. Justice Reed dissented on his view that the failure of the automatic coupler to fasten on the first impact was not a proximate cause of the injury. "The failure," he said, "did not contribute to the injury. That was caused by a too rapid coupling on the second effort."[123]

Mr. Justice Douglas took no part in the consideration or decision of this case.

Mr. Justice Frankfurter repeated his position that the writ of certiorari was improvidently granted and should have been dismissed, again paying his lack of respect to "the anachronistic Federal Employers' Liability Act" based on negligence and involving "inevitably casuistic efforts to apply the concepts of 'negligence,' 'proximate cause' and 'contributory negligence' which served well enough employer-employee relations which have long since ceased." He again plumped for the substitution of a workmen's compensation act by Congress, but, of course, not by judicial legislation by the Court.[124]

Again in *Affolder v. New York, C. & St. L. R. R.*,[125] the Court held to the same effect in another opinion by Mr. Justice Clark. It also held that $80,000 was not an excessive verdict for the loss of a leg.

Mr. Justice Reed and Mr. Justice Jackson dissented. Mr. Justice Douglas took

[121] 338 U. S. 430 (1949).
[122] 338 U. S. at 437.
[123] 170 F. 2d 719 (5th Cir. 1948).
[124] *Id.* at 437-438.
[125] 339 U. S. 96, decided March 13, 1950.

no part. Mr. Justice Frankfurter again thought that the writ of certiorari should have been dismissed as improvidently granted, and Mr. Justice Jackson also agreed with that view.

In his separate dissent, however, Mr. Justice Jackson pointed out that the Court of Appeals thought the trial court's charge as a whole "very probably gave the jury the impression" that it need only find that two cars failed to couple on impact to establish a violation of the coupler provision of the Safety Appliance Act. "This," he said, "as the Court recognizes, is not the law. Before a failure to couple establishes a defective coupler, it must be found that it was properly set so it could couple. If it was not adjusted as such automatic couplers must be, of course the failure is not that of the device."[126]

Mr. Justice Jackson had learned some of the facts of life about couplers since his opinion for the Court in the *O'Donnell* case. Evidently the majority of the Court had not.

The 1950 Term

In *Moore v. Chesapeake & O. Ry.*,[127] the Court, in an opinion by Mr. Justice Minton, returned to the law as it had been consistently declared by the "old court" and as late as in the *Brady* case in 1943, broke the long trend of decisions in favor of plaintiffs by a soundly reasoned decision, and, for the first time since *Brady*, clearly indicated that the law of negligence had not been destroyed and that the Court has no intention of administering the FELA as a workmen's compensation act as long as Congress leaves it a negligence statute.

Justices Black and Douglas, the remaining two of the old *bloc* of four, dissented. Mr. Justice Reed took no part. Mr. Justice Frankfurter again thought the writ should have been dismissed as improvidently granted, for the reasons he had expressed in the *Carter* and in the *Affolder* cases.

The district court had granted the defendant judgment notwithstanding the verdict for plaintiff. The Court of Appeals for the Fourth Circuit affirmed.[128] The Supreme Court affirmed.

Plaintiff's intestate was a brakeman in switching yards. The day was fair. At about 3:50 p.m., the crew with which he was working undertook its first car movement of the day. An engine and tender were headed into Track 12, and the front end of the engine was coupled onto 33 loaded freight cars which were to be moved out initially upon the straight track referred to as the ladder track. The switch at the junction of Track 12 and the ladder track was properly aligned for the train to pass onto the ladder track. Who aligned the switch did not appear.

Decedent gave the signal for the engine to back out of Track 12 with the cars. It moved out in a westerly direction, with the rear of the tender as the front of the moving train. Decedent was standing on a footboard at the rear of the tender, his back to the tender; the outer edge of the footboard was about ten inches in

[126] *Id.* at 101.

[127] 340 U. S. 573, decided Feb. 26, 1951.

[128] 184 F. 2d 176 (4th Cir. 1950).

from the outer edge of the tender and about a foot above the rail. The engineer was in his seat on the same side of the train as the footboard on which decedent was standing. The engineer was turned in the seat and leaning out the side cab window, looking in the direction in which the train was moving. Decedent's duty as he rode on the footboard was to give signals to the engineer, who testified that he could at all times see the edge of the arm and shoulder of decedent. To be thus seen and in a position to give signals, decedent had to extend outward beyond the edge of the tender, supporting himself partly by a handrail; otherwise the tender, the top of which was eight feet seven inches above the footboard, would have obstructed the engineer's view of him altogether.

The engineer testified that as the train approached Switch 12 at about five miles per hour, having moved ten or twelve car lengths, he saw decedent slump as if his knees had given way, then right himself, then tumble forward in a somersault toward the outside of the track. The engineer testified that he then made an emergency stop in an unsuccessful effort to avoid injuring decedent. The train ran the length of the tender and engine and about a car length and a half before it stopped at a point about an engine or car length past the switch on the ladder track. Decedent died immediately of the injuries received.

On these facts the Supreme Court reaffirmed what was said but not applied in *Tennant v. Peoria & P. U. Ry.* (321 U. S. 29, 32) to the effect that, in order to recover under the Act, it was incumbent upon the plaintiff to prove negligence of the defendant which caused the fatal accident. The negligence alleged by the plaintiff was that defendant's engineer made a sudden and unexpected stop without warning, "thereby causing decedent to be thrown from a position of safety on the rear of the tender" into the path of the train.

Holding that the evidence was not sufficient to carry this allegation to the jury, Mr. Justice Minton, writing for the Court, said:[129]

> It is undisputed that only one stop of the train was made and that a sudden stop without warning. The engineer was the only witness to the accident and was called to testify by petitioner. He testified that he saw decedent fall from the tender and that he made an emergency stop in an attempt to avoid injuring him. He testified that he received no signal to stop and had no reason to stop until he saw decedent fall. When his attention was directed to the point, the engineer never wavered in his testimony that decedent was continuously in his view and in a position to give signals up to the time he was seen to fall and the emergency stop was made.
>
> Petitioner attempts to avoid the effect of this by pointing to statements of the engineer which allegedly contradict his testimony that decedent was continuously in his view. Petitioner relies on testimony and measurements of an expert witness, and upon the fact that the jury was permitted to view the engine and tender, to support the alleged contradiction. As a consequence, it is asserted, the jury was entitled to disbelieve the engineer's version of the accident and to accept petitioner's.
>
> True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of the engineer's testimony would not supply a want of proof. *Bunt v. Sierra Butte Gold Mng. Co.*, 138 U. S. 483, 485. Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it.

[129] 340 U. S. at 575-576.

Hence, the opinion pointed out that all the evidence showed was that decedent fell before the train stopped; that, if one did not believe the engineer's testimony that he stopped after—indeed, because of—the fall, then there was no evidence as to when decedent fell; that there would still be a failure of proof; and the opinion concluded saying:[130]

> To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. *Galloway v. United States,* 319 U. S. 372, 395.

Even on that state of facts, the dissenting justices, Black and Douglas, argued that the trial court should have allowed the jury to run riot in just that kind of speculation, asserting their opinion that the taking of this verdict from petitioner is "a totally unwarranted substitution of a court's view of the evidence for that of a jury."[131]

The 1951 Term

Nothing happened at the 1951 Term to throw any doubt on the soundness of the decision in the *Moore* case.

In *Desper v. Starved Rock Ferry Co.,*[132] the Court, Mr. Justice Jackson writing the opinion, held that a man employed in the winter in painting, cleaning, and waterproofing boats in a sightseeing fleet of motorboats which were to be used only in the summer months for sightseeing on a river, was not a "seaman" within the meaning of the Jones Act.

Mr. Justice Black and Mr. Justice Douglas dissented.

Dice v. Akron, C. & Y. R. R.,[133] was a decision by the Court, opinion by Mr. Justice Black, against the railroad on an issue as to an alleged fraudulent release. The Court reversed the Supreme Court of Ohio, which had affirmed a verdict for defendant notwithstanding jury verdict for the plaintiff. Under Ohio law factual issues as to fraud in the execution of a release "other than fraud in the factum" are to be determined by the judge. "Fraud in the factum" is to be determined by the jury. The Supreme Court of Ohio held that the issue involved in this case was not "fraud in the factum" but fraud in the inducement, and, hence, that the judge had the right to and was required to determine the fraud issue notwithstanding the jury's verdict.[134]

The Supreme Court held that this was a federal question, that Ohio law could not control, and reversed on the merits of the decision. Mr. Justice Black again quoted the language from *Bailey v. Central Vermont R. R.* (319 U. S. 350), to the effect that "The right to trial by jury is 'a basic and fundamental feature of our

[130] *Id.* at 577-578.
[131] *Id.* at 580.
[132] 342 U. S. 187, decided Jan. 2, 1952.
[133] 342 U. S. 359, decided Feb. 4, 1952.
[134] 155 Ohio St. 185, 98 N. E. 2d 301 (1951).

system of federal jurisprudence' "; ". . . that it is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act"; and that to deprive railroad workers of the benefit of a jury trial where there is evidence of negligence "is to take away a goodly portion of the relief which Congress has afforded them."[135]

Justices Frankfurter, Reed, Jackson and Burton concurred in reversal but dissented from the Court's opinion, a recent technique of a "concurring dissent" or a "dissenting concurrence," as the emphasis may be. They did not think that state courts necessarily have to provide jury trials for FELA cases, *Minneapolis & St. L. R. R. v. Bombolis* (241 U. S. 211), having clearly so held thirty-six years ago and having been often cited by the Court but never questioned. However, they thought that the fraud issue raised a federal question, and, since they could not be sure that the trial court had followed the federal test in passing on that issue, they concurred in the reversal.

The 1952 Term

At the time this goes to press there has been only one decision by the Supreme Court at the October Term, 1952, falling within the scope of this paper, the six-to-three decision on February 2, 1953, in *Stone v. New York, C & St. L. R. R.* (73 Sup. Ct. 358). In that case Mr. Justice Douglas delivered the opinion for the majority. There had been a jury trial and a verdict for the petitioner, Stone, in a trial court in Missouri. The Missouri Supreme Court reversed (249 S. W. 2d 442 (1952)), holding that plaintiff had not made out a submissible case either as to negligence or as to causation. The United States Supreme Court reversed the Missouri Supreme Court.

The case was strikingly like that of *Blair v. Baltimore & Ohio R. R.* (323 U. S. 600, *supra*). In the *Stone* case Stone and another employee were removing old or worn track ties. The rails were jacked up, the spikes that held the rails pulled, the tie plates removed, and the ties pulled, usually being pulled with tongs by two men. If there were any old spikes protruding downward from the tie into the ground, three or four men would usually be required to pull the tie.

Stone and his fellow servant were unable to remove a tie because, as it turned out, a spike was driven through it into the ground. The "straw boss" told Stone he was not pulling hard enough. The straw boss then put a bar under the far end of the tie while Stone and the other man pulled again. Still the tie would not come out. The straw boss told Stone to pull harder. Stone said he was pulling as hard as he could. The straw boss then said, "If you can't pull any harder, I will get somebody that will." So Stone, with his fellow servant, gave a hard pull and Stone hurt his back. The tie was finally pulled out by four men—two pulling, one prying with a crow bar, one hammering with a maul.

On these facts the Supreme Court, reversing the Supreme Court of Missouri, held that the case was peculiarly one for the jury, since fair-minded men might reach

[135] 342 U. S. at 363.

different conclusions as to whether there was a causal connection between the order of the straw boss to pull harder and Stone's back injury.

Mr. Justice Frankfurter, with whom Mr. Justice Reed and Mr. Justice Jackson joined, dissented. Again Mr. Justice Frankfurter paid his disrespect to negligence as the basis of liability in the FELA. He said (73 Sup. Ct. at 360):

> However, the central components of liability for negligence—that it rests upon fault and that appropriate causality must be established between the negligent circumstances and the complained-of injury—are the same for actions under the Federal Employers' Act as for any other negligence actions. For reasons that I for one have long deplored, Congress has seen fit to make such a concept of negligence the basis of compensation for inevitably untoward incidents.
>
> I deplore this basis of liability because of the injustices and crudities inherent in applying the common law concepts of negligence to railroading. To fit the hazards of railroad employment into the requirements of a negligence action is to employ a wholly inappropriate procedure—a procedure adequate to the simple situations for which it was adapted but brutally unfit for the situations to which the Federal Employers' Liability Act requires that it be put. The result is a matter of common knowledge. Under the guise of suits of negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act, but with all the hazards and social undesirabilities of suits for negligence because of the high stakes by way of occasional heavy damages, realized all too often after years of unedifying litigation.

Although the dissenters indicated that they were clear that understanding and fair-minded judges on the Supreme Court of Missouri could have held that the facts of this case were for the jury, nevertheless the dissenters could not say that the Missouri Supreme Court could not, as it did, hold that the plaintiff did not make a submissible case under the Act either for negligence or as to causation. Accordingly, they dissented from the reversal of the Supreme Court of Missouri.

The majority and dissenting opinions in this latest case again leave the law in a state of confusion. The dissenting opinion, indeed, introduces a wholly new test as to whether a case is made for the jury, a test not as to what members of the Supreme Court of the United States would have held if they had been members of the highest court of the State, but whether the highest court of the State has a right to apply its own test, which ought not to be reversed by the United States Supreme Court on its own different view.

The facts in the *Stone* case were very thin for a holding that a submissible case was made out for the jury. Yet the majority of the Supreme Court reversed the unanimous Supreme Court of Missouri on its holding that a submissible case was not made out.

As the present paper goes to the press there are some dozen additional FELA cases pending at the October Term, 1952, either on petition for certiorari or for argument, none of which has yet been decided. It would not be proper to comment on any of these undecided cases.

III

CONCLUSION

If the decisions since *Brady* and down to *Eckenrode* and *Moore*, particularly such decisions as *Tennant*, second *Tiller*, *Poff*, and *Lavender*, continue to be followed, then the Supreme Court will have completely undermined the general law of negligence. But if *Brady*, *Eckenrode*, *Reynolds*, and *Moore* continue to be followed as controlling precedents, then the law of negligence will have been preserved and it will be up to the Congress, not the Court, to determine whether it is wiser to substitute a workmen's compensation insurance law for the present negligence statute.

As Gouverneur Morris used to say succinctly in his Paris Diary, "*Nous verrons.*"

This writer is profoundly convinced that such a decision is a legislative one for Congress, not a judicial one for the Court, however "antiquated" its members may feel a negligence statute to be.

THE VINDICATION OF A NATIONAL PUBLIC POLICY UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

MELVIN L. GRIFFITH*

I

When William Bradford, Governor of Plymouth Colony, wrote his history of "Plimouth Plantation," he felt it necessary to introduce his subject by saying that he must "begine at ye very roote and rise of ye matter." If there has been failure to understand fully what Congress undertook to accomplish by the legislation designed to give relief to men engaged in operative railroading, it is due to the fact that there has been little, if any, inclination anywhere to get at "ye very roote and rise of ye matter."

It is not new or unusual that the legislative necessity for the declaration by government of national public policy, in the interest of justice and the public welfare, arises out of the nature and importance of some particular undertaking, business or vocation—its hazards, its isolation, its limited or farflung field of operations, and the importance of the contribution made by those so engaged to social, political and economic progress. Whether such a public policy, based upon these and other factors more or less potent, is expressed in usage, custom, and practice, or in constitutions and statutes, its claims to continued public approval must rest upon its social value, as proved through time and experience. The survival of such a policy expressed in a statute, in the face of continuous and concerted attack upon it by those who profess a philosophy hostile to it and by powerful interests claiming to be adversely affected by it, through long periods of time during which the policy has been steadily strengthened and broadened by the law-making body which declared it and by the courts charged with the duty of construing it, constitutes the strongest proof of the soundness of the policy.

In seeking to appraise the social, political and economic value of a public policy in the interest of those engaged in a particular vocation, it is not enough to point to some other class or group in society which is not given similar privileges. The search for sustaining or destructive factors must be directed at the peculiar problems and the contribution to social progress of the group benefited. The modern rules and practices in admiralty, for example, have their origin in ancient usage,

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custom, and practice developed and proved through time and experience, as best suited for use in the government of men who earned their livelihood on the seas. Such rules and practices, it is said, were first collected into manuscript and established as a public policy with reference to seamen, by the inhabitants of the little island of Rhodes. These ancient laws of the sea developed, through centuries, into a system of jurisprudence so different from that which governed those who earned their livelihood on land that the Roman Emperor, Augustus, could declare:[1]

> I am the master of the earth, but the Rhodian law is mistress of the sea.

In admiralty today, in the United States, the seaman who seeks there a vindication of the rights guaranteed to him by admiralty law, is treated as a ward of the court.[2] It is not without significance that when Congress gave to seamen an additional remedy in the law courts, it granted to them the benefits of the same national public policy it had declared for railroad men in the Federal Employers' Liability Act.[3]

Transport, either upon land or upon the sea, has always determined whether social, political and economic life should be local or national. The most potent factor in the revolutionary change from feudalism to nationalism, was the improvements in transport by sea and by land. Introduction of the locomotive and the railway, in the nineteenth century, inaugurated a social and economic revolution. The railways, followed in turn by the steamship, the telegraph, the telephone, the automobile, the aeroplane, and radio communication, transformed the world. The importance of the railway in the development of our own country was within the vision of its pioneers. In 1828, one of those pioneers, Charles Carroll, the sole survivor at that time of that great group of patriots who signed the Declaration of Independence, turned the first spade of earth in the construction of the Baltimore and Ohio Railroad, at Baltimore, Maryland. He made a speech that day in which, referring to his act of turning that first spade of dirt in the construction of what is now one of our great railroad systems, he said:[4]

> I consider this among the most important acts of my life; second only to my signing of the Declaration of Independence; if even it be second to that.

When Charles Carroll uttered these significant words, there were approximately 23 miles of railroad in the United States. The opening two years later of the few miles of railroad, the construction of which was launched by that vital spade of dirt, by the Baltimore and Ohio and of the first few miles of the South Carolina Railroad, grown now into the great Southern Railway System, was the real beginning of the railway epoch—the age of man's most significant advancement. Nearly forty years later, May 10, 1869, the glory and the achievement of that era were symbolized

[1] James Henry Willock, *Commentary on Maritime Workers*, UNITED STATES CODE ANNOTATED, TITLE 46, pp. 211, 214.

[2] *See* Isbrandtsen Co. v. Johnson, 343 U. S. 779 (1952).

[3] 38 STAT. 1185 (1915), as amended, 41 STAT. 1007 (1920), 46 U. S. C. §688 (1946); Garrett v. Moore-McCormack Co., 317 U. S. 239 (1942).

[4] ASSOCIATION OF AMERICAN RAILROADS, QUIZ ON RAILROADS AND RAILROADING, QUESTION No. 296 (9th ed. 1951).

by the driving of gold and silver spikes where East met West, at the linking of the Union and Central Pacific Railroads at Promontory, Utah, to form the first great transcontinental steel highway of commerce in America. In the next twenty years it was possible to travel from the Atlantic Coast to the Pacific Coast over at least six different railroad systems. The men who furnished the courage, the genius, and the vision to bring about this transportation epoch in human history, the end of which is still beyond far horizons of the indomitable will and spirit of man, have enduring places in history along with the great navigators of the seas, who discovered not only new routes of trade and commerce, but new worlds to serve as new stages upon which man could work and dream out his destiny.

In the last quarter of the nineteenth century and the first ten years of the twentieth century, the fact that there is another side to this picture of glory and achievement, burst upon the public consciousness. There are the multitudes of men who as individuals have remained obscure, but without whom those giant enterprises could have gained neither wealth nor power nor usefulness in the nation's economy. They are the men who hold in their hands the safety of our goods and merchandise when we ship them from one place to another and of our own lives when we go, ourselves, on a journey—the men who have the hazardous job of maintaining the lines and of operating the trains on which we ride or transport our goods. For them, it appeared that these steel paths of glory led but to the grave.

President Harrison, speaking of the plight of these men in his message to Congress in 1889, said:[5]

> It is a reproach to our civilization that any class of American workmen, should in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.

As railroads lengthened to traverse state after state of the union and finally to span and spider-web the continent, such regulation as there was in the interest of the safety of the lives and limbs of operative railroad men fell successively to the states through which the lines ran. There was not, nor indeed could there be, any uniformity in such state laws as were placed upon statute books to control or to ameliorate these conditions. The great railroad corporations became laws unto themselves. Railway cars were coupled together with what was known as the link and pin system, requiring the trainmen to step in front of cars or go between them to make the couplings. Cars were equipped with hand brakes, requiring men to go upon moving cars to stop them or to control their speed. In addition, as these dangerous devices and methods began to give way to time-saving and, incidentally, to life-saving coupling, braking, and other devices, such devices notoriously lacked uniformity. This lack of uniformity arising from chaotic state regulation and the great numbers and types adopted by the various railroads in various states contributed greatly to the casualty lists among operative railroad men. A brakeman's

[5] See Johnson v. Southern Pac. Co., 196 U. S. 1, 19 (1904); 12 MESSAGES AND PAPERS OF THE PRESIDENTS 5486 (Richardson ed. 1897).

chances of dying a natural death were in 1888, 1 to 4.7.[6] The average life expectancy of a switchman in 1893 was seven years.

The development and final adoption of the national public policy forecast by the President in his message to Congress in 1889, is a story of dark and bitter years. The men, themselves, in the face of warnings by their employers that they would lose their jobs for doing so, played a significant role in the process of improving conditions, by organizing themselves into transportation brotherhoods—the Brotherhood of Locomotive Engineers, founded in 1863; the Order of Railway Conductors in 1868; the Brotherhood of Locomotive Firemen and Enginemen in 1873; and the Brotherhood of Railroad Brakemen, later the Brotherhood of Railroad Trainmen, in 1883. These Brotherhoods, strictly speaking, were not in those days labor unions. They were, in fact, fraternal bodies, organized for insurance protection against injury and death in the course of employment. The meager sum that could be paid in fraternal benefits to totally disabled members or to the next of kin of those who were killed was virtually the only protection the men had or could get.

The period intervening between the beginning in America of the railway epoch and the final enactment of the Federal Employers' Liability Act in 1908, saw the rise and fall of *laissez faire*—the doctrine of non-interference by government in matters concerning labor. That doctrine, under the influence of the philosophy of David Ricardo, the English economist of the late eighteenth and early nineteenth centuries, in which the laborer was regarded as merely a chattel in the hands of capital, bore down with heavy tragedy upon the operating railroadman. He stood helpless and alone under ruthless practices of his railroad employer. He feared even to approach his employer except to render beneficial service. He took such wage as was offered, endured such working conditions as he found, and, in fear, obeyed such rules as were made by management. When he became a casualty of his hazardous employment, he took what his employer offered him, which, if indeed any offer at all was made, was so inadequate as to bear no relation to the damages suffered. There was, of course, the common-law right of action in court open to him, for damages resulting from his employer's negligence, in case he determined not to accept the amount, if any, offered him in settlement of his claim. If he chose to follow that course, he found that his employer could there urge judge-made defenses that, for all practical purposes, insulated the employer from bearing any of the cost of the human overhead of this highly hazardous business—the fellow-servant rule, contributory negligence as a bar to the action, and assumption of risk. He might also be met there by some contract or device by which the employer had successfully exempted itself from liability.

The real essence of the national problem, presented by the growing casualties among railroad men and the consequent burden that was cast upon these workers and their families, was to resolve the sharp conflict between the brutal philosophy of Ricardo and the humanitarian doctrines of the great social philosophers of the

[6] THIRD ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION 85 (1889).

time in favor of this important group of men who earned their livelihood on land. It was a dramatic demonstration of these sharply conflicting views in the period when the states, alone, were frantically seeking answers to the appalling casualties among operative railroad men that lighted a torch and placed it in the hands of a man who, with the aid and backing of five presidents of the United States and of the railroad Brotherhoods, became the father of the federal Acts declaring this national public policy. A bill requiring grab irons, as a safety measure, to be placed upon freight cars was introduced in the Massachusetts legislature and was assigned to a joint committee of the two Houses to hold hearings on the proposal. A railroad official at the hearing denounced the proposal as an outrage. "Why," the official exclaimed, "every time a fellow grabbed that thing, he would give the car such a wrench, it would spring a leak and ruin the contents." The objector was thinking of the leaky car and the bill for damaged merchandise and not of the trainman who might seize the grab iron only to save his life.[7]

A member of the legislature and of this joint committee, was Edward A. Moseley. He was not a railroad man. In his early life he was a seaman. The effect upon him of the grab iron incident led him into his real life's work—that of securing federal relief for operative railroad men.

The Interstate Commerce Act was passed by Congress, March 7, 1887,[8] as the inevitable result of the proved inability of state governments to deal with even the ordinary problems of commerce between the several states. That Act created the Interstate Commerce Commission, as the corporate agent of the Federal Government with administrative and quasi-judicial power over the railroads operating in interstate commerce.

Mr. Moseley became the first Secretary of the Commission in 1887. In the first year of his secretaryship he caused the Commission to employ a statistician; in his second year, with the statistician's report in his hands, he began to inform the public about the high casualties in railroading. On January 31, 1889, he called a conference of all state railroad commissioners to be held at the office of the Commission in Washington on March 5, 1889. The conference was attended by representatives of every state and territory with but few exceptions. One of the major questions discussed was safety appliances in railway transportation. A resolution was unanimously adopted by the Conference urging the Commission to develop and recommend national measures that would give relief to railroad employees, thousands of whom were being injured and killed every year. Pursuant to this resolution, on May 17, 1889, Mr. Moseley addressed a circular relating to federal regulation of safety appliances on the railroads to all state railroad commissioners, to the principal officers of railway companies, to the railroad transportation Brotherhoods, and to other important groups and individuals. The state railroad commissioners, with few notable exceptions, favored such federal regulation. The Brotherhoods gave

[7] JAMES MORGAN, THE LIFE WORK OF EDWARD A. MOSELEY IN THE SERVICE OF HUMANITY 57 (1913).
[8] 24 STAT. 379 (1887), as amended, 49 U. S. C. §1 *et seq.* (1946).

strong support to the proposal as did the Master Car Builders Association, *The Engineering Journal,* and many civil engineers and other interested and farseeing individuals. The Brotherhood of Railroad Trainmen, then the Brotherhood of Railroad Brakemen, in addition to a strong-favoring letter to the Commission, filed a Petition addressed to the Commission in which it was said:[9]

> Each of the undersigned is in actual service as a railroad brakeman or has been employed a sufficient length of time to become fully acquainted with the duties and perils of the position, and although some of us have been promoted, we most earnestly appeal to your honorable body to urge upon Congress the necessity of national legislation in this matter, that the terrible slaughter of brakemen on the railroads of this country every year may be largely diminished.

The railroads which answered the circular were in unanimous opposition to the Commission's proposal of federal regulation.

The national public policy, forecast by the arresting description of conditions by Mr. Moseley and by President Harrison in his 1889 message to Congress, had been initiated. These historic steps and events led through Mr. Moseley's continued pressure and the growing public concern and demand for relief, to the enactment by Congress in 1893 of the original Federal Safety Appliance Act.[10]

Mr. Moseley did not stop there. The Brotherhood of Railroad Trainmen held its First Biennial Convention at Boston, Massachusetts, in October 1893. It held a public reception there on October 17, at which the governor of Massachusetts, the mayor of Boston, Edward A. Moseley, L. S. Coffin, and the executive officers of the labor organizations of the country gave addresses. Mr. Moseley in his address said in part:[11]

> There is something appalling in the statement that more hard-working and faithful railway employees in the United States, went down in sudden death last year than the entire number of Union men who died at the Battle of the Wilderness; nearly as many as those who died the bitter death at Spottsylvania; more than three times the number of the Union dead at Lookout Mountain, Missionary Ridge and Orchard Knob combined, and that more of the grand army of railway men of this country were cut and bruised and maimed and mangled last year than all the Union wounded and missing on the bloody field of Gettysburg; nearly equal in number to the wounded and missing in the reign of death and devastation at Shiloh, first and second Bull Run and Antietam combined; while there traveled under the care and guidance of this clear-headed and vigilant army of railway workers 560,958,211 passengers with so much ease and safety that only one in every 1,491,910 was killed and only one in every 173,833 was injured from all causes, including their own carelessness.
>
> We are standing upon the shores of the Atlantic. Looking to the east we behold a broad expanse of water. Upon this coast—within sound of the roar of the surf—not a storm arises but a prayer goes up from the good housewife for the safety of the poor sailor struggling with the elements. Why is this solicitude so fervently expressed?

[9] THIRD ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION 340 (1889).

[10] 27 STAT. 531, 45 U. S. C. §§1-7 (1946).

[11] 10 RAILROAD TRAINMEN'S JOURNAL 930-939, 853 (Oct. 1893); MORGAN, *op. cit. supra* note 7, at 60-62.

From time immemorial the limitless deep has been associated with peril to human life, and the most anxious feelings of our race have been evoked in behalf of those "who go down to the sea in ships." For centuries every civilized language has, in prose and poetry, extolled the heroism of the sailor, and sympathized with the dangers and sacrifices of the toiler who earns his livelihood upon the unstable elements. The sound of the waves and the heavy blasts call attention to the fact and tend to perpetuate one of the finest traits in our human nature—a brotherly interest in the welfare of a worthy portion of the community.

And yet, how little of this commendable sympathy is bestowed on the equally brave and far more exposed toiler working in the freight yard or on the rail! He, too, is traveling a deck. To be swept from it will hurl him to eternity in a far more sudden and agonizing way than the poor fellow carried by a wave from the deck of a vessel. The latter, in many instances, has a chance—with the help of a resolute heart and sinewy arm —of rescuing himself from a watery grave. How vast the difference with the victim of the railway, the great modern agent of civilization, as essential to human intercourse as the ship has been since the earliest times!

Yet dangers to the trainmen do not come home to the good people. Their attention has not yet been sufficiently awakened to the subject. Let them think of the fated fellow who slips between the cars and whose only possible escape is by a desperate grasp at their icy sides; or of him who, swept from the running board of the rapidly moving car, is hurled to instant and certain destruction.

Dangers beset him everywhere. As he works amid an intricate warp of iron-rails, the next step may fasten his heel in the deadly unblocked frog, holding him in a vise, suffering an agony of suspense, while the wheel bears down upon him to mangle his poor body and crush his life out.

Let people reflect that it requires fully as much courage and nerve to peer out into the darkness and catch sight of a few feet of gleaming rails in front, all else the blackness of night, as it does to stand on the bridge of a ship and with straining eyes endeavor to avoid the passing vessel, the derelict, or the iceberg.

In 1895, two years later, he caused the first Employers' Liability Act to be introduced in Congress as a sort of trial balloon. He drafted the bill and aroused such interest in its objectives that he was able to enlist the vigorous support of President Theodore Roosevelt who drove it through the Fifty-Ninth Congress in 1906.[12] Congress, committed to the purpose of the law, which in January 1908 was held unconstitutional,[13] under the lash of several vigorous messages from the President, enacted the constitutional Act three months later, April 22, 1908.[14]

The original Safety Appliance Act of 1893 was extended and strengthened by many amendments, beginning in 1896 and continuing through 1940.[15] In 1910 Congress amended the Act[16] by adding Sections 11-16 to impose upon the Interstate Commerce Commission the duty of adopting rules and regulations designating and standardizing the number, dimensions, location, and manner of application of all safety appliances on all railroad cars and other equipment. Pursuant to the Act as

[12] 34 STAT. 232 (1906).
[13] The Employers' Liability Cases, 207 U. S. 463 (1908).
[14] 35 STAT. 65 (1908), 45 U. S. C. §§51-60 (1946).
[15] 27 STAT. 531 (1893), as amended, 45 U. S. C. §§1-46 (1946).
[16] 36 STAT. 298 (1910), 45 U. S. C. §§11-16 (1946).

thus amended, the Interstate Commerce Commission made its order of March 13, 1911, standardizing all safety appliances and equipment.[17] These rules and regulations are integral parts of the Safety Appliance Act and have the force of law.[18]

Under the Federal Employers' Liability Act of 1908, venue was left by Congress under the then general venue statute for federal circuit and district courts. That statute provided:[19]

> . . . no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between the citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant.

An employee suing under the Act was thus compelled to sue his employer in the state where it was incorporated. By 1910, litigation under the Act in the intervening two years convinced Congress that this limitation as to venue was unjust to the employee, and in that year the present venue clause was added to the act. The amendatory bill, as first drawn, made causes of action arising under the Act completely transitory by fixing venue as:[20]

> . . . the district of the residence of either the plaintiff or the defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of commencing such action.

It was considered that this language gave too wide a choice and might result in injustice to the carrier. The language adopted, after much debate, was:[21]

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business, at the time of commencing such action.

Senator Borah of Idaho, in charge of the amendment in the Senate, in stating its purpose and scope said:[22]

> The bill enables the plaintiff to find the corporation at any point or place or state where it is actually carrying on business, and there lodge his action, if he chooses to do so.

It was in connection with this vital amendment to the original Act that the national public policy declared by the Act was fully expressed in Congress:[23]

> This subject is referred to here only for the purpose of calling upon Congress to make entirely manifest the good faith of the legislature in the enactment of the employers' liability law, which places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of

[17] 49 CODE FED. REGS. Parts 131-136 (1949).
[18] Lilly v. Grand Trunk Western R. R., 317 U. S. 481, 488 (1943).
[19] 36 STAT. 1168 (1911), 28 U. S. C. §112(a) (1927).
[20] 45 CONG. REC. 2253 (1910).
[21] 36 STAT. 291 (1910), as amended, 45 U. S. C. §56 (1946).
[22] 45 CONG. REC. 4034 (1910).
[23] *Id.* at 4041.

this country is appalling. The total casualties to trainmen on the interstate railroads of the United States for the year 1908 was 281,645.

It was the intention of Congress in the enactment of this law originally and it may be presumed to be the intention of the present Congress, to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in the Taylor case (210 U. S. 281), "measurably control their causes."

The passage of the original act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change, as far as congressional power can extend, those rules of the common law which the President, in a recent speech at Chicago, September 16, 1909, characterized as "unjust." President Taft in his address at Chicago, September 16, 1909, referred "to the continuance of unjust rules of law exempting employers from liability for accidents to laborers."

This public policy which we now declare is based upon the failure of the common-law rules as to liability for accident, to meet the modern industrial conditions and is based not alone upon the failure of those rules in the United States, but their failure in other countries as well. . . .

. . . . . .

The passage of the law was urged upon the strongest and highest considerations of justice and promotion of the public welfare. It was largely influenced by the strong message of President Roosevelt to the Sixtieth Congress in December, 1907, in which the basis of the legislation was clearly and strongly placed upon the ground of justice to the railroad workmen of this country and in which legislation was urged to the limit of congressional power upon this subject.

These expressed purposes of Congress and the policy thus announced did not meet with a friendly reception by the courts. After the adoption of the 1910 amendment, the Employers' Liability Act ran the rapids of streams of restrictive interpretations and of constructions placed upon its provisions by the courts which reimposed many of the old common-law defenses that, in the original Act, it was the intention of Congress to abolish. The Act was so battered and damaged at the hands of the courts by 1939 that further rehabilitation and repair by Congress became essential. The 1939 amendment repaired the damage to the Act's provisions that had resulted from its turbulent passage through the courts. That amendment made the purpose of Congress in passing the law in the first place so clear and positive as to leave no reasonable loophole for further innovations by the courts.[24]

The Supreme Court of the United States, in an impressive series of decisions rendered subsequent to the 1939 amendment and under the unmistakable authority of its provisions, has written what may be accepted as the brightest page in the long struggle of operative railroad men to achieve justice and an equal position of bargaining power with their powerful employers in securing adequate safeguards to life and limb and adequate compensation for wrongful injury and death in the course of their highly hazardous employment. The court placed the capstone upon the policy of national regulation of matters concerning the welfare of this important group of men who earn their livelihood on land, by welding together as the founda-

[24] 53 STAT. 1404 (1939), 45 U. S. C. §51 (1946); see Mr. Justice Douglas' concurring opinion, Wilkerson v. McCarthy, 336 U. S. 53, 68 (1948).

tion of that policy the two branches of the legislation in which the national policy is declared. In *Urie v. Thompson,* the Court placed the Federal Safety Appliance Acts in *pari materia* with and supplemental to the FELA and said:[25]

> In this view the Safety Appliance Acts, together with the Boiler Inspection Act, are substantively if not in form amendments to the Federal Employers' Liability Act. They dispense, for the purposes of employees' suits, with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law. Thus taken, as has been the consistent practice, the Boiler Inspection and Safety Appliance Acts cannot be regarded as statutes wholly separate from and independent of the Federal Employers' Liability Act. They are rather supplemental to it, having the purpose and effect of facilitating employee recovery, not of restricting such recovery or making it impossible.

Thus, the national public policy forecast by President Harrison in his 1889 message to Congress, like grist from the slow mills of the gods, came to full realization.

II

In the foregoing pages, it was the purpose of the writer to transpose, as nearly as possible for this present year of 1952, the view of the conditions out of which this national public policy arose that was held by those men of the past who initiated that policy and wrote it into law. There, in order that we may understand what that policy is, we look forward through their eyes. It is now, after forty-five years since the policy was declared, essential in our appraisal of that policy, to look backward through our own eyes. The laws in which this national public policy was declared, were not self-executing. They were but the ounce of prevention. There still had to be the pound of cure.

The scope of the legislation has been recently defined by both Congress and the Supreme Court. Congress, in the 1939 amendment, clearly defined what it meant to do in previous amendments and the original Act:[26]

> *Any employee* of a carrier, *any part* of whose duties as *such employee* shall be the furtherance of interstate or foreign commerce; or shall, in *any way* directly or closely and substantially, *affect* such commerce as above set forth shall for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. (Italics supplied.)

Congress here used the all-inclusive language that was used in Section 5 of the original Act[27] in defining contracts and devices which it declared void when their effect was to exempt the carrier from "any liability under this chapter." Although the Supreme Court has not directly construed the quoted provision, the Court's interpretation of its all-inclusive language is foretold by the Court's ruling upon the identically all-inclusive language of Section 5 in *Duncan v. Thompson,* where the Court said:[28]

[25] 337 U. S. 163, 189 (1949).
[26] 53 STAT. 1404 (1939), 45 U. S. C. §51 (1946).
[27] 35 STAT. 65 (1908), 45 U. S. C. §55 (1946).
[28] 315 U. S. 1, 6 (1942).

Because the various state measures directed against contractual arrangements intended to exempt employers from liability were thus laid before Congress, the rejection of the restrictive language of §3 of the old act indicates a deliberate abandonment of the limitations of that section. And the adoption of §5 of the present act, without adding any of the other limitations which some of the state statutes had embodied, argues persuasively that Congress wanted §5 to have *the full effect that its comprehensive phraseology* implies. (Italics supplied.)

Congress had legislated to the limit of its power over commerce upon the subject. Chief Justice Marshall in *Gibbons v. Ogden* in defining this power, said:[29]

This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

When Congress, in the circumstances described above, exercised this power in the enactment of these laws originally and in strengthening them through amendments, it left no element of justice to railroad workmen in that field, unprotected. But, inevitably, the benefits under the Acts accrued only to those workmen, or to their next of kin, who could successfully invoke the provisions of the laws to enforce the rights and privileges therein granted. Edward A. Moseley, who with the assistance of the Brotherhoods, had initiated, drafted, and caused these laws to be introduced in Congress, and who so skillfully and persistently engineered them through the legislative mill, was also the first to realize the handicap under which the workers and their families must proceed in the enforcement of their rights. They were usually without funds and were ignorant of their rights under the Act. Its enactment found them in despair in the face of their condition and paralyzed by the fear of losing their jobs and such security as was furnished by their wages. Characteristically, Mr. Mosely sought a method of overcoming these handicaps. When the 1906 Act became law, railroad attorneys promptly assembled to plan a campaign against it in the courts. Mr. Moseley successfully urged upon the government the adoption of a vigorous defense. He prepared a lengthy paper outlining a plan of action and submitted it to the administration. In it he suggested the preparation of a general brief for use as far as applicable in *any* case that might arise under the law and, in conclusion, said:[30]

It may be a new theory, but is it not well within the province of the attorney-general of the United States, when the constitutionality of any act passed by Congress is called in question, to use the resources of the government to the fullest extent in his power to protect the integrity of that act, particularly when, as in this case, the measure is one which is designed to protect the just rights of a vast body of our country's working citizens, and to relieve them from the disabilities entailed upon them by the failure of powerful railroad corporations to provide suitable appliances and facilities for the protection of the lives and limbs of their employees?

[29] 9 Wheat. 1, 9 (U. S. 1824).

[30] JAMES MORGAN, THE LIFE WORK OF EDWARD A. MOSELEY IN THE SERVICE OF HUMANITY 109-110 (1913).

His suggestion was taken up at a cabinet meeting and the government agreed to follow Mr. Moseley's plan. In announcing the government's decision to intervene in defense of the law, he said:[31]

> I regard this action as one of the most important events in the interest of labor that has ever occurred. Were railway employees, who seek to obtain damages for injuries received, left to their own resources there is no question that the benefits which this law seeks to confer upon them would be neutralized or entirely destroyed by the action of the courts.
>
> The railroad companies have the strongest array of legal talent in the country, and this talent will all be directed toward defeating the ends of any such law as this. No private individual can hope to cope with such power; it will be impossible for any railway employee, who invokes the aid of this law, to employ attorneys who can successfully meet the arguments of counsel for the railroad companies. But with the resources of the department of justice placed at his command, in order to protect the integrity of the law, the railway employee is placed on a plane of practical equality with the railway company, and he is thus insured a square deal.

The United States, through the Attorney General's office, filed briefs amicus curiae, in accordance with this agreement, in both the *First* and *Second Employers' Liability Act Cases*.[32]

If the above language of Mr. Moseley was prophecy, its indisputable truth has long since been established. That is not strange, for it is the language of a man who not only knew what was taking place, but could see into the future from the vantage point of thirty years of intimate experience with the problems of operative railroad men, with the attitude of the railroads toward their employees, and with the obtuseness or hostility of many of the courts where such problems were involved. He knew that, notwithstanding the positive expressions of the law, employees would still be confronted by the same philosophy that revealed itself to him in the startling grab iron incident referred to above. This was, indeed, what happened.

Mr. Moseley did not live to visit the Supreme Court, as was his custom on opinion days, on January 15, 1912, when the Act of 1908 was held valid, but he had established a precedent in the intervention of the United States on the side of the railroad employees, which was later followed by the Brotherhood of Railroad Trainmen in developing a similar plan which has assured these men and their families of able and honest legal representation in cases arising under the Act.

During the years from 1908, when the Act first became law, to 1930, when a Legal Aid Plan was finally adopted by the Brotherhood of Railroad Trainmen having the same purpose as the Moseley plan, it became increasingly evident that the national public policy, which the laws represented, was being widely flouted and defeated. Although the Brotherhoods had, by every means available, sought to inform their members of their rights under the law, fears as to their jobs and of the loss of such security as those jobs gave them had over the years been so instilled into them by their railroad employers, as to offer so much resistance to general accept-

[31] *Id.* at 110.
[32] 207 U. S. 463 (1908); 223 U. S. 1 (1912).

ance of advice, even from their union officials, that little headway could be made through these processes.

In these circumstances, the Brotherhood conceived it to be its duty to do everything that was essential and reasonably adapted to furnish any one of its members who had been injured in the course of his employment, or his next of kin in the event his injuries were fatal, assistance in adjusting or enforcing his claim against his employer. This was as certainly within the scope of its great purposes as were any of its activities affecting wages, hours, or conditions of work.

In 1928, ambulance chasing came under investigation by the courts of Ohio, New York, and other states. In the course of extended hearings on that subject, the activities of corporation claim agents were also investigated. In a partial report by Judge E. D. Fritch of Summit County, Ohio, who was in charge of the Ohio investigation, he observed:[33]

> The great inequality in position and in bargaining power between the corporation claim agent and the injured person, is sufficient justification for such legal measures as will safeguard the injured person when he undertakes to make his own settlement.
>
> . . . . . .
>
> Taking more or less drastic action against soliciting lawyers, and at the same time permitting claim agents to pursue their nefarious practices will not remedy the situation disclosed by the evidence. The public interest which of course includes that of injured persons, requires that both evils should be effectively dealt with.

In New York, Justice Wasservogel who was in charge of the investigation there, heard more than one thousand witnesses. His report was made the subject of an editorial in the *American Bar Association Journal* for November, 1928, entitled, "Nationwide War on 'Ambulance Chasers.'" The writer of the editorial, after reviewing the report, said:[34]

> It is worth noting that the improper practices found were not confined to the ambulance chasing lawyer—the attorney for the plaintiff. "The evidence before me," says Mr. Justice Wasservogel in his report, "shows that casualty companies, transportation companies and other corporate defendants have engaged in practices equally reprehensible. Frequently the insurance adjuster races with the 'ambulance chaser' to the bedside of the injured person to obtain a release from him while he is overwrought and in pressing need of money. If a release cannot be obtained, the injured person is asked to sign a statement of the circumstances of the accident or is plied with questions. The oral or written statements extracted do not present a fair or complete picture. Nevertheless, they are used against the plaintiffs at the trial with exaggerated and harmful effect. Furthermore, representatives of some corporate defendants have not hesitated to effect settlements directly with claimants whom they knew to be represented by attorneys. This practice is unfair to such attorneys and deprives the clients of the benefit of their advice."

Under such conditions as those set forth in the remarks of counsel and in this extract from the Justice's report, it goes almost without saying that the victims of accidents have been notoriously exploited and that justice in most of such cases has become the merest travesty.

[33] 1 OHIO BAR ASS'N REP. 301, 302, 304 (Nov. 1928).
[34] 14 A. B. A. J. 561, 563 (1928).

At the time these investigations were in progress and these reports were being made, the Brotherhood of Railroad Trainmen was carrying on an investigation of its own. As a result of its findings, the president of the Brotherhood in his annual report for 1930, said:[35]

> During the course of my several years experience as an officer of the Brotherhood it has come to my attention on a number of occasions, that injured members of the organization, and the dependents of members who had been killed while engaged in railroad service, had fared rather badly at the hands of railroad claim agents in some instances, as well as at the hands of so-called ambulance chasing lawyers in other instances.
>
> In many cases settlements wholly inadequate in the light of the seriousness of the injuries and the responsibility of the employers had been made with members of the Brotherhood who were either entirely devoid of any knowledge of their rights in such matters, or who had been induced to make cheap settlements by misrepresentations indulged in by those who sought to effectuate these settlements. In still other cases, attorneys had either suffered defeat in law suits because of their inexperience or lack of ability to properly prosecute railroad damage claims.
>
> In many cases attorneys had charged the injured men what appeared to be highly exorbitant fees for the service rendered.

To meet this situation, it was proposed that a Legal Aid Department be set up as part of the Brotherhood's activities in the interest of its injured members and their next of kin. The general counsel of the Brotherhood at that time, in justifying such a department, said in his annual report for 1929:[36]

> The word "brotherhood" has a peculiarly significant meaning. It is supposed to indicate a fraternal spirit of helpfulness. Its purpose should be to render aid when distress comes; to offer help when help is really needed. A well man may be independent, but disability, sorrow and suffering create dependence. To desert a brother at such a time, when hardship threatens him and his family, is to make the term "brotherhood" seem like hollow mockery. The highest service any Brotherhood can render is to aid and protect its members when trouble comes, not alone in health, but in the hour of affliction. It undoubtedly would be a welcome thought to the members of the organization to know that when misfortune comes, they may turn for aid and advice to their own Brotherhood and receive the help and counsel they so sorely need. It is a matter of vital importance to our members that they shall not be kept in ignorance of their rights so that cheap and unfair settlements may be made. On the contrary provisions should be made for advising them of their rights and in assisting them to obtain them in so far as it is practical and consistent to do so.

The department was created by dividing the United States into sixteen regional areas, determined by: the density of membership in those areas; the character of the railroads, including mileage of tracks serving the area; and the accessibility of the lawyers selected, from different parts of the territory for which they were selected. Sixteen such areas, including the one wherein the Brotherhood had its principal

[35] BROTHERHOOD OF RAILROAD TRAINMEN, REPORT OF THE PRESIDENT 262 (1930).

[36] BROTHERHOOD OF RAILROAD TRAINMEN, REPORT OF TOM J. MCGRATH, GENERAL COUNSEL, TO A. F. WHITNEY, PRESIDENT 12 (July, 1929).

office, were chosen. The general counsel for the Brotherhood visited each of the selected areas and made an investigation of attorneys available as regional counsel. Their selection was based upon their reputation for skill and experience in handling personal injury claims, upon their reputation for honesty and fair dealing with their clients, and upon their being recommended by local federal and state court judges. Agreements were entered into with fifteen lawyers or law firms located in New York City, Boston, Minneapolis, Syracuse (New York), Cleveland, Chicago, Portland (Oregon), Kansas City (Missouri), St. Louis, Houston, Baltimore, Birmingham, Atlanta, San Francisco, and Denver.[37]

A regional counsel, at first, was required to handle cases on a contingent fee basis of 20 per cent of the amount recovered. He was required to remit 5 per cent to the department to cover the overhead expense and might keep 15 per cent for his fee. The department then required the observance of certain rules and practices which were a part of the contract. However, the attorney fulfilled every obligation he had undertaken to the Brotherhood when he fulfilled his full professional duty to the employee client.

Another feature of the plan was for the Brotherhood to employ skilled and experienced investigators and, when requested by the claimant, to send them into any regional area to assist an injured man or his next of kin in securing the facts and all other information, incident to and pertinent in the preparation of his case, for purposes both of settlement and suit in the event a fair amount could not be agreed upon in settlement. This was most important for the reason that all such facts and information in every case are collected by experts sent immediately by the railroads to the scene of the accident. The facts and information gathered by the legal aid investigators are turned over to the claimant or to any attorney employed to handle the case, whether it be regional counsel or someone else.

The plan at first was experimental and has been substantially changed over the years to remove every detail that could serve as the basis for honest criticism, either from the standpoint of law or of professional ethics. There is no longer any contract between regional counsel and the Brotherhood and no portion of the fees are now remitted to the Brotherhood. Its objective, however, is the same—to place the Brotherhood back of the Liability Act plaintiff where the Moseley plan placed the United States. The objective was immediately approved by the courts.[38]

It was not surprising, in view of the large economic interest involved, that the railroads overlooked the humanitarian nature of the objective and made the plan the subject of immediate and bitter attack. To give color to their attack, they adopted the view that it was an ambulance-chasing outfit and that regional counsel were in violation of canons of Ethics when they accepted the plan and represented Liability Act claimants under it. The railroads by emphasizing the ambulance-chasing and violation-of-legal-ethics theory, soon acquired as an ally, the organized bar, in their

[37] BROTHERHOOD OF RAILROAD TRAINMEN, REPORT OF THE PRESIDENT 266 (1930).

[38] Ryan v. Pennsylvania R. R., 268 Ill. App. 364 (1933); *In re* O'Neill, 5 F. Supp. 465 (E. D. N. Y. 1933).

fight against this new champion of employees' rights—the Legal Aid Department of the Brotherhood. Members of local bar associations were persuaded that they were letting business get away from them. They came to believe that they had a vested interest in any case under the Act in which the cause of action arose in their territory. "These Regional Counsel in the big cities," they reasoned, "were 'draining off' from their locality, business which should be kept at home. The big city lawyer was growing rich while they were growing poor."

The entire story of this sordid procedure is told in a resolution adopted by two Tennessee local bar associations on June 8, 1946. It was placed in the record at the trial of a chancery suit at Knoxville which will later be described.[39] Its pertinence here is, first, its falsity as shown by comparison with the statements in the reports of the president and general counsel in their 1930 reports and with the findings of the courts in the *Ryan* and *O'Neil* cases.[40] Second, it leaves no question as to the real reasons behind the fight against the Legal Aid Department. As taken from the record in the chancery case where it became a public document, the two associations resolved:

> Whereas, it has come to the attention of the Knoxville Bar Association that certain Railroad Brotherhoods have organized what is known as a Legal Aid Department ostensibly to assist the members of the organization and their dependents in securing damages for injuries sustained by railroad employees entitled to the benefits of the Federal Employers' Liability Act and for the beneficiaries of such employees who are fatally injured while engaged in the furtherance of interstate commerce, and such Legal Aid Department has appointed attorneys in various sections of the United States, who are designated as Regional Counsel for a certain territory and has also appointed Field Representatives in the several territories, and that whenever an injury or death occurs, the Field Representative calls on the injured employee or the beneficiary of such employee for the purpose of inducing said party to employ the so-called Regional Counsel, the result being that lawyers in foreign states are soliciting and taking away business from lawyers in states where the claims arise, and the practice of solicitation and transportation of claims is seriously undermining the traditional ethical standards of lawyers. By reason of these efforts on the part of the parties herein, many suits are brought in East St. Louis, Illinois and in other places far distant from the place where the accident occurred or the plaintiff resided.
>
> Now, Therefore Be It Resolved, that we, the Knoxville and Knox County Bar Association, go on record as condemning this solicitation of claims in the manner set out in this resolution as being unethical and improper, and that a committee of three attorneys be appointed by the President of this Association to institute an injunction bill to enjoin such practices in the event any Regional Counsel or other representative of the Legal Aid Department comes into the jurisdiction of the Courts of Knox County; that copies of this Resolution be forwarded to Senators Kenneth D. McKellar and Tom Stewart, and to Congressman John Jennings, Jr., of the Second Congressional District of Tennessee, urging that legislation be passed in Congress confining the jurisdiction of suits under the

[39] Doughty v. Grills, in the Chancery Court for Knox County, Tennessee, before the Honorable Charles E. Dawson, Chancellor, No. 34351, Injunction, pp. 24-25, Trial Court Record and pp. 84-85 of Record made up and certified by the Clerk of the Supreme Court of Tennessee, W. H. Earle, Aug. 25, 1952.

[40] See note 38 *supra*.

Federal Employers' Liability Act to the District Court of the district in which the injured plaintiff resided at the time of the injuries on which the action is based, or in the district in which plaintiff's intestate resided at the time of the injuries causing death; or such action may be brought in the District Court of the United States in the district where the cause of action arose; or such action may be brought in a State Court of competent jurisdiction in the county where the injured plaintiff resided at the time of the injuries, or where the plaintiff's intestate resided at the time of the injuries causing his death or in the county in which the action arose;

Be It Further Resolved, that a committee from the local Bar Association be given a copy of this Resolution and be authorized to present same to the appropriate committee of the Tennessee State Bar Association in convention at Memphis, and, if necessary, on the floor of the convention itself, urging that appropriate measures be taken to stop said unauthorized and unethical practices.

The committee appointed under the last paragraph of the resolution filed a suit in chancery at Knoxville in 1950 against an investigator of the Legal Aid Department and a former local chairman of the local lodge of the Brotherhood of Railroad Trainmen, charging them with ambulance chasing in a complaint that closely paralleled the language of the resolution. The case was tried before the chancellor and a jury in March, 1951, five years after the resolution was adopted. The committee produced eighteen witnesses who testified on the merits of the case. The witnesses were local railroad men who had been injured and widows of railroad men who had been killed. All of them either settled, or sued on, their claims against the railroad. Many of them had known one or the other or both of the defendants for periods ranging from a few months to a lifetime. While it was shown that the defendants had, at the request of some of the witnesses, informed them of their right to secure advice from the Legal Aid Department and regional counsel about their cases; advised them that they need not employ regional counsel but could employ any lawyer of their choice, including regional counsel, to handle their claims; visited the injured in hospitals; attended and sent flowers to funerals; visited the homes of deceased brothers to deliver to the widow proceeds of insurance policies held by the deceased in the Brotherhood; adjusted deceased's retirement pay; and sent food and clothing to the children and widows of deceased men, not a single witness produced by the committee testified that the defendants had sought to solicit the claim of any witness for any attorney, as charged in the complaint.

The case went to the jury on special interrogatories. The jury was out only ten minutes. The verdict was not guilty. The chancellor dissolved a temporary injunction that had been entered when the complaint was filed and dismissed the suit. On appeal to the Court of Appeals in Knoxville, that court—not upon the pleadings and the evidence, but upon inferences drawn from a combination of assertions made in the resolution—selected bits of testimony of some of the witnesses, the affirmative portions of defendants' answers, a portion of the Brotherhood's constitution in evidence as to the Legal Aid Department, and a stipulation that no FELA suits had been filed in the circuit courts of Knox county or in the federal court in Knox county by injured Brotherhood members in the last ten years; and

reversed the Chancellor's judgment. The Supreme Court of Tennessee denied a petition for certiorari, July 18, 1952.[41]

The Knoxville and Knox county bar had five years in which to find a witness that would pin the label of ambulance chaser on men employed by the Legal Aid Department to carry out its humanitarian objectives or upon that agency of the Brotherhood. They produced no such witness and won the case on the basis of the unfounded charges made in the resolution which were not proved by any evidence at the trial and which never could have rated any higher as admissible evidence than any other purely irresponsible propaganda.

This and other activities of the organized bar were in complete disregard of the right of claimants to sue the employer under the Act in East St. Louis, Illinois or in any other eligible forum, as well as their right to recover maximum damages in any suit they elected to file. These rights had only recently been reaffirmed by the Supreme Court in *Boyd v. Grand Trunk Western Railroad,* where the Court said:[42]

> The vigor and validity of the *Duncan* decision was not impaired by *Callen v. Pennsylvania R. Co.,* 332 U. S. 625 (1948). We there distinguished a full compromise enabling the parties to settle their dispute without litigation, which we held did not contravene the Act, from a device which obstructs the right of the Liability Act plaintiff to secure the maximum recovery if he should elect judicial trial of his cause. And nothing in *Ex parte Collett,* 337 U. S. 55 (1949), affects the initial choice of venue afforded Liability Act plaintiffs. We stated expressly that the section of the Judicial Code there involved, 28 U. S. C. §1404(a), "does not limit or otherwise modify any right granted in §6 of the Liability Act or elsewhere to bring suit in a particular district. *An action may still be brought in any court, state or federal, in which it might have been brought previously.*" 337 U. S. at 60.
>
> *The right to select the forum granted in §6 is a substantial right. It would thwart the express purpose of the Federal Employers' Liability Act to sanction defeat of that right by the device at bar.* (Italics supplied.)

The suit was also in complete disregard of another right that claimants have under the Act itself. The Act provides:[43]

> . . . whoever, by *threat, intimidation,* order, rule, contract, regulation, or *device whatsoever,* shall attempt to prevent *any person* from furnishing voluntarily such information to a person in interest . . . shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or both such fine and imprisonment, for each offense. (Italics supplied.)

[41] Certified Record, referred to in note 39, *supra,* at 584.

[42] 338 U. S. 263, 266 (1949).

[43] This comprehensive language of Section 10, 53 STAT. 1404 (1939), 45 U. S. C. §60 (1946), is one part of the 1939 Amendment that was essential to protect the injured employee or his next of kin from known devices designed to defeat claims under the Act by closing the avenues to facts and information incident to accidents causing injury and death. One known device was a rule that provided, "Employees who witness or have any knowledge of an accident, or of the facts involved, must not give information concerning it or talk about the occurrence to the injured person, lawyers, or to any other person or persons, unless legally required to so do, except only to company officials and claim agents. Information given to this company's representatives shall be as complete as possible and all facts must be stated whether favorable or unfavorable to anyone." See *Hearings before a Subcommittee of the Senate Judiciary Committee on S. 1708,* 76th Cong., 1st Sess. 21 (1939).

The Knoxville Bar suit described in the text was in marked degree a substitute for these obstructive rules.

This chancery suit was addressed to the chancellor, keeper of the public conscience. The prayer for relief was in the name of justice, law, and professional ethics. After the evidence was in, the chancellor and twelve jurors, all citizens of Knox county, found nothing shocking to the public conscience and nothing in violation of law or professional ethics, and dispensed justice accordingly. The Court of Appeals, although it found "no evidence whatever in the record as to the constitution of the Legal Aid Department of the Brotherhood as to what services that department through its regional counsel performed, or was expected to perform, for the members," reversed on the theory that the Legal Aid Plan "tends to show a *pattern* with respect to efforts to have personal injury and death claims against railroads *sucked* out of Knox County."[44] The two defendants, under this decision, are permanently restrained from exercising toward injured men and their next of kin that "fraternal spirit of helpfulness" indicated by the word "Brotherhood" upon which the general counsel in his Annual Report of 1929 rested his recommendation that the Legal Aid Department be created. One cannot review the record in this Knoxville proceeding, without a mental paraphrase of Madame Roland's famous apostrophe to Liberty[45] just before her execution: Oh, Legal Ethics! What travesties are committed in thy name.

Regional counsel do not have a monopoly of these Liability Act claims. Many able, experienced, and honest lawyers throughout the nation by reason of established reputation are employed by injured men and their next of kin. But the Legal Aid Plan and the examples set by regional counsel, who work always within its spirit and purpose, have established a standard, both as to fees and treatment of these claimants, that has compelled even some out-and-out ambulance chasers to abandon to some extent the old methods that smacked so much of banditry, in favor of something like fair dealing. Moreover, unscrupulous claim agents find claimants better informed about their rights and less apt to fall into the traps described so accurately by Mr. Justice Wasservogel in his report referred to above.

This Legal Aid Plan of the Brotherhood can reasonably be given the chief credit for the real effectuation of this national public policy.

III

The creation of the Legal Aid Department by the Brotherhood furnished one of the major issues that gave rise to numerous controversies that punctuated the administration of this national policy after the adoption by Congress of the venue provision of the Act in 1910, and in particular after 1930. From that date down to this day, the Association of American Railroads, generally, and numerous individual railroads, in particular, have employed every conceivable method designed to obstruct or to destroy the rights guaranteed by the Act's provisions to injured railroad men and to their next of kin where injuries prove fatal.

In the first place, when cases reached the courts, railroad lawyers in their failure

[44] Certified Record referred to in note 39, *supra*, at 448.
[45] O Liberty! What crimes are committed in thy name.

or refusal to understand or to be guided by the spirit and purpose of the law, grasped at every straw in the wind of hostile judicial philosophy and counted every ruling tending to weaken the law or to reimpose old common-law defenses as a crack in the wall of the edifice of justice to these men erected by Congress in this legislation. The restrictive interpretations of the law thus gained were again swept away by the 1939 Amendment.[46]

In the second place, many other devices and procedures were drawn from the legal and propaganda arsenals of the railroads and the organized bar for the purpose of preventing Liability Act claimants from breaking out of areas where attorneys with skill and experience in handling these cases were usually under retainers by the railroads and where the lawyers available to these claimants were not competent to advise them as to their rights and to secure the maximum recovery for injury and death to which they were entitled under the Act. There was what became popularly known as the "Rock Island Release," in which an injured man was induced, for the smallest consideration he would accept, to sign a written agreement that, if his claim could not be amicably settled, he would bring suit in a particular court or in the courts of a particular county, district or state. It took years to defeat this device in the courts, but it was finally held invalid by the United States Supreme Court in *Boyd v. Grand Trunk Western Railroad*.[47] There was the attempt, by injunction, to defeat the purpose of the Act, wherein the plaintiff was enjoined from prosecuting a suit brought in any court outside the "point, place or state" where plaintiff lived or the accident happened. This practice ended in failure when it was ruled out by the Supreme Court of the United States in two decisions.[48] The device is now being revived. In *Pope v. Atlantic Coast Line Railroad*,[49] the Supreme Court of Georgia held that the *Kepner* and *Miles* decisions[50] were no longer controlling since Congress in its revision of the Federal Judicial Code for the convenience of parties and witnesses in the interest of justice, gave federal district courts the power to transfer any civil action to any other district or division where it might have been brought.[51] The Supreme Court of the United States has granted certiorari and the case is now pending in that court.[52] There was the attempt to use the doctrine of *forum non conveniens* which ended when the Supreme Court of the United States held that the doctrine was subject to one invariable limiting principle—namely, that it was not applicable in cases arising under the FELA.[53]

The attack upon the venue provision had, in the meantime, been shifted to direct action. The Association of American Railroads had acquired as an ally the organized bar, in so far as the leadership of its national and state bodies was concerned.

[46] Wilkerson v. McCarthy, 336 U. S. 53, 69 (1949).
[47] 338 U. S. 263 (1949).
[48] Baltimore and O. R. R. v. Kepner, 314 U. S. 44 (1942); Miles v. Illinois Central R. R., 315 U. S. 698 (1942).
[49] 209 Ga. 187, 71 S. E. 2d 243 (1952).
[50] See note 48 *supra*.
[51] 28 U. S. C. §1404(a) (1948).
[52] 344 U. S. 863 (1952).
[53] United States v. National City Lines, 334 U. S. 573, 596 (1948).

The Knoxville bar put the resolution quoted above in the hands of Congressman John J. Jennings, Jr., a resident of Knoxville, representing in Congress the Second Congressional District of Tennessee. He introduced a bill, closely following directions contained in the resolution, in the House as H. R. 1639, which in the Senate became S. 1567.[54] The theory of the proponents was that repeal of the venue provision would end ambulance chasing in connection with the claims and would also end the Brotherhood's Legal Aid Department. The array of proponents and opponents of the bills appearing at the hearings before congressional committees led to this accurately characterized description of the fight that ensued as a result of the proposed legislation:[55]

> In this battle of the titans, the organized railroad transportation industry and the organized legal profession joined in supporting the proposal and were opposed by organized railway labor.

It is of interest to note here that a special assistant to the Attorney General of the United States presented a statement with respect to S. 1567 at the hearing before the Senate Committee on the Judiciary in which the issues raised by the legislation were analyzed and questions were raised as to the desirability of the changes in legislative policy represented by the proposed repeal of the venue section of the Act.[56]

Congressman Jennings, with the resolution of the Knoxville bar as a foundation and guide, personally wrote "the Presidents of the Bar Associations of each of the 48 states and to hundreds of the presidents of the local bar associations throughout the United States" in order to secure approval of H. R. 1639. He received resolutions from most of the state bar associations, from the American Bar Association, and from hundreds of county and city bar associations.[57] The propaganda he sent out and his testimony in the transcripts of hearings before congressional committees labeled the Brotherhood Legal Aid Department as a nationwide racket, carrying on a nefarious practice of active solicitation of cases arising under the Federal Act; and depriving the local lawyer of litigation which in his view properly should be handled in the forum where an accident occurred, or where the injured party resided, at the time of the accident.[58] He and other proponents of the bill, in order to strengthen these claims as to the Legal Aid Department, used the skilled propagandist's technique of establishing guilt by association. A notorious ambulance-chasing case then pending in Chicago was dramatically interwoven with charges of running, soliciting, and chasing of cases made against regional counsel of the Brotherhood and brought to the attention of the committees by a former Chief Justice of the Supreme Court of Illinois who had been employed by the railroads to prosecute

[54] *Hearings before a Subcommittee of the Senate Judiciary Committee on S. 1567 and H. R. 1639*, 80th Cong., 2d Sess. (1948).

[55] Mangan, *Federal Legislation*, 37 GEO. L. J. 43 (1948).

[56] *Hearings*, *supra* note 54, at 12.

[57] *Hearings before Subcommittee No. 4 of the House Judiciary Committee on H. R. 1639*, 80th Cong., 1st Sess. 13 (1947).

[58] *Id.* at 12.

the case.[59] References throughout the testimony of the various proponents of the bill are made to regional counsel as ambulance chasers who "drain off" legal business from local lawyers, enriching themselves and impoverishing the local lawyers.[60] These prodigious efforts thus made to destroy the venue provision of the Act failed when the bill died in committee in 1948.[61]

Here again the reasons given by the proponents of H. R. 1639 and S. 1567 for repealing the venue provision of the Act remind one of the historic utterance of Madame Roland as she bowed before the clay statue of Liberty in the Place de la Revolution on her way to the guillotine.

In 1939, near the end of the Seventy-Sixth Congress, the need for a comprehensive revision of the United States Judicial Code (28 U. S. C.) was recognized. In that and future Congresses, appropriate legislation was passed to provide for such a revision. The statute representing such a revision went into preparation in 1944. It was completed, introduced in Congress as H. R. 3214, and was pending in Congress simultaneously with the Jennings Bill, H. R. 1639. Jennings, who introduced H. R. 1639 in the House, and at least one of the noted lawyers who appeared before the House and Senate Committees on the Judiciary to urge its passage and who was then representing one of the big western railroads in a notorious ambulance-chasing case in Chicago, were on important committees in charge of the revision of the Judicial Code. The Revision statute became law in June 1948, effective September 1, 1948.[62]

After the new Code became law, it was discovered by railway labor which was not represented on the revision staff or on any committee in charge of the revision, that it contained the following harmless-appearing provision:[63]

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The Reviser, in his note to this section, stated that this provision had been drawn in accordance with the doctrine of *forum non conveniens* and he cited *Baltimore & Ohio Railroad v. Kepner*,[64] as an example of the need for such a provision. The controversy that arose, both in the federal and state courts, as to the effect of this provision on FELA cases was settled by the Supreme Court of the United States in Ex parte *Collett*,[65] where the Court held that federal courts were given discretion by the provision to transfer FELA cases along with all other civil cases, where the provision applies. The Court took note in its opinion in Ex parte *Collett*, of the assurances given to Congress by the revision staff and members of the committees of the Senate and House that changes in the Code that could be deemed contro-

[59] *Id.* at 16; see *Hearings*, *supra* note 54, at 38. See also Atchison, Topeka and Santa Fe R. R. v. Andrews, 338 Ill. App. 552, 88 N. E. 2d 364 (1949).

[60] See *Hearings before House and Senate Committees on the Judiciary on H. R. 1639 and S. 1567*, *supra*, notes 54 and 57.

[61] See 62 STAT. 989, amendment of §6, June 25, 1948, 45 U. S. C. A. §56 (1952).

[62] 28 U. S. C. §1 *et seq.*

[63] 28 U. S. C. §1404(a) (1950).

[64] 314 U. S. 44 (1942).

[65] 337 U. S. 55 (1949).

versial had been studiously avoided. Congress was assured that, though changes and improvements in existing law had been made, such as had been made were of a wholly non-controversial nature. The Court, however, held in effect that these assurances could not be considered as of any importance in deciding the case for the reason that the provision was unanimously approved by Congress and that this unanimity demonstrated that there was, in fact, nothing controversial about the provision. The Court could have found, had it looked far enough, that the absence of controversy resulted solely from the fact that only one side to the controversy was present at every stage of the process of inserting this provision in the Revised Code, from its initiation to its enactment as a part of the Code. Railway labor was not there and had no warning that it needed to be there. Even the Department of Justice which was affected by the provision in a manner very nearly as vital as railway labor, although it studied and approved the complete Code, was not aware of the provision's insidious character. These are the reasons for the failure of the provision to excite controversy in Congress when the Code became law.

In *Hayes v. Chicago R. I. & P. Railroad,* the first case in which Section 1404(a) was applied, the court in allowing a motion to transfer under the provision, said:[66]

> There is no basic reason why plaintiffs in cases under the Federal Employers' Liability Act should not be subject to the same equitable doctrine of transfer as applies to all other civil cases now that Congress has enacted a statute which indicates no exception to the application of that principle.

Later the Supreme Court in Ex parte *Collett* held that the provision does not limit or otherwise modify any right granted in Section 6 of the Act or elsewhere to bring suit in any particular district.

In *Newton v. Pennsylvania Railroad,* in denying a motion to transfer under §1404(a), the court said:[67]

> The view contended for by the defendant would come close to making §1404(a) a venue statute, under which the court, after striking a nice balance of conveniences, would be bound to limit the plaintiff to a single jurisdiction. If that had been the purpose, the statute would have directed the courts to make transfers to the most convenient jurisdiction—a very different question from that involved in the doctrine of forum non conveniens.

The evolution of the interpretation and construction process in dealing with this provision has carried the courts to the position that the power to transfer should be exercised only in exceptional cases and to correct abuses.[68] However, under its influence, application of the doctrine of *forum non conveniens* now rests upon the policy and procedures in the several states rather than upon federal policy.[69] But it still remains true that in the 1939 amendment to the Act, which was the last time the Act has been in need of repair, Congress not only adhered to its previous views,

[66] 79 F. Supp. 821, 824 (D. Minn. 1948).
[67] 85 F. Supp. 761, 764 (E. D. Pa. 1949).
[68] See United States v. Scott and Williams, 88 F. Supp, 531, 534 (S. D. N. Y., 1950).
[69] Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U. S. 1 (1950).

but greatly strengthened and extended the protective features of the Act. It was still acting under what it deemed to be the urge of the strongest and highest considerations of justice and the promotion of the public welfare.

Thus, the integrity of the law, which was the chief concern of the Moseley and Brotherhood Legal Aid plans, has been maintained through nearly a half century of bitter controversy. As a result, the stringent liability placed upon the railroads with the view that it would "compel the highest safeguarding of the lives and limbs of the men in this dangerous employment," has borne visible fruit. In the year 1907, when the Act of 1906 was under attack and the Act of 1908 was in the making, the casualty lists showed 4,534 men killed and 87,644 injured. In 1950, with a greatly increased number of men exposed to that danger, there were 392 killed and 22,586 injured.[70]

As was said in the beginning, the survival of such a policy when expressed in a statute in the face of continuous and concerted attack upon it by those who profess a philosophy hostile to it and by powerful interests claiming to be adversely affected by it, through long periods of time during which the policy has been steadily strengthened and broadened by the law-making body which declared it and by the courts charged with the duty of construing it, constitutes the strongest proof of the soundness of the policy. Congress has never departed from the high notion of its handiwork held when this national public policy was announced in 1910 and the courts have settled down to that liberal construction of the law that is held to be warranted by its humanitarian objectives. This national public policy has been fully vindicated.

IV

This legislation has also survived the onslaughts of those disciples of change who are easily persuaded that principles, unlike good wine, do not improve with age. Let there be a condition that excites human propensities toward reform; a consequent social problem; existing remedies keyed to the instinctive conflict between those to be benefited and those who are to bear the costs of the benefits; a proposed remedy that promises an expeditious and a more or less automatic solution, if these conflicts be disregarded; an occasion for claiming that an idealistic reform is to be consummated—and these disciples of change at once espouse the cause of promoting the adoption of the new remedy. This is not said in disparagement of idealism. It is idealism that sets the pace for practical measures to meet any problem. It was Edward A. Moseley's practical idealism that in the face of intolerable conditions, led to the Safety Appliance, Federal Employers' Liability, and other acts that now stand as models for measures that are supplanting workmen's compensation laws.

The critics of the principle that fault is requisite to liability—written into the FELA—have been overruled by time and experience. Congress, when the Employers' Liability Acts were under consideration, had before it the legislation of all of

[70] INTERSTATE COMMERCE COMMISSION, ACCIDENT BULL. NO. 119 (APPENDIX A, SUMMARY STATEMENTS OF RAILWAY ACCIDENTS IN THE UNITED STATES FOR THE YEARS 1888-1950) 112 (1951).

the nations of continental Europe, Great Britain and its dominions, and the several states of this nation, dealing with methods of compensation for accidental injury and death.[71] In the forty-four years since the Liability Act was passed in 1908, there have been twenty-six bills, introduced in twelve Congresses, to replace it with workmen's compensation acts.[72] It is now advocated that the workmen's compensation principle of liability without fault be extended to cover all cases of accidental injury and death, traditionally covered by the common law of torts.[73]

The principle of liability without fault was society's original method of compensation for any sort of damage done to one person by another. He who innocently caused damage to another was required to make the injured person whole. The innocent was in a position no different from the wrongdoer of that time. This principle was abandoned about the year 1400 A.D. and replaced by the principle that fault is essential to create liability. The modern workmen's compensation acts, five hundred years later, in principle, gave recrudescence to this ancient rule of law.[74] The two principles have been competing for survival in this country for a half century and in particular ever since the enactment of the present FELA.

Recent important events have made it unnecessary to re-argue the relative merits of these two principles. In July, 1946, the Departmental Committee on Alternative Remedies in England, was instructed among other things:[75]

> (a) To consider, having regard to the observations on the subject of alternative remedies in the Report on Social Insurance and Allied Services, and to any developments which announcements by the Government show to be contemplated in connection with that Report, how far the recovery or proceedings for the recovery of damages or compensation in respect of personal injury caused by negligence should affect, or be affected by, the provision made or proposed to be made under Workmen's Compensation legislation or under any social insurance or other statutory schemes for affording financial or other assistance to persons incapacitated by injury or sickness, or their dependents:
>
> . . . . . .
>
> (b) To consider, having regard to any relevant observations in the aforesaid Report and in the Report of the Law Revision Committee on Contributory Negligence, whether in the case of injuries to workmen due to their employment, any alteration is desirable in the law governing the liability of employers and third parties to pay damages or compensation to workmen and their legal representatives and dependents, independently of the Workmen's Compensation Acts.

As a result of the study made under these instructions, there was submitted to the

[71] *Hearings before Subcommittee of Committee Having Under Consideration H. 239 and S. 156 and S. 1657 Relating to Liability of Common Carriers by Railroads in District of Columbia and Territories and Common Carriers by Railroads Engaged in Commerce Between States and Between States and Foreign Nations to Their Employees*, 59th Cong., 1st Sess. (1906); *Hearings before the House Judiciary Committee on H. R. 17036 Relating to Liability of Common Carriers to Employees*, 60th Cong., 1st Sess. (1908).

[72] Pollack, *Workmen's Compensation for Railroad Work Injuries and Diseases*, 36 CORNELL L. Q. 236, 271 (1951).

[73] Malone, *Workmen's Compensation Law*, 9 NACCA L. J. 20 (1952).

[74] Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 239 (1913-1914).

[75] FINAL REPORT OF THE DEPARTMENTAL COMMITTEE ON ALTERNATIVE REMEDIES, CMD. NO. 6860 (1946).

Minister of National Insurance by Sir Walter J. Monckton, Chairman of the Committee, a Final Report, in July, 1946,[76] which led to the enactment by Parliament of The Law Reform (Personal Injuries) Act of 1948.[77] This law repealed all workmen's compensation acts.[78] It became the master statute of a group of laws closely similar to the group of laws enacted by Congress—the Safety Appliance Acts,[79] the Railroad Retirement Act,[80] and the Railroad Unemployment Insurance Act[81]—of which the FELA is the master statute.

The English Act of 1948 provides for recovery of damages resulting from the negligence of the employer. The injured employee may draw upon the insurance fund for disability caused by his injuries to sustain him until his claim is settled or he collects a judgment at the end of a law suit. From the proceeds of recovery he repays the amount drawn from the insurance fund. Thus the very citadel of workmen's compensation has returned to the principle that fault is requisite to liability.

A study has just been completed under the authority of the University of Illinois in which the superiority of the FELA system over that of the workmen's compensation system is conceded. The authors of the Report resulting from the study quote, approvingly, the following conclusion of "an experienced compensation attorney" as to the workmen's compensation system:[82]

> The utopia of speed and simplicity sought by the legislators has eluded the injured worker, and legal representation remains indispensable. In fact, boards or commissions generally have come to frown upon an employee's appearing without counsel, or a layman's attempting to practice before them.

A substantial percentage of these railroad cases arises under the Safety Appliance Acts, under the provisions of which the duty of the carrier is absolute and proof of negligence is not required.[82a] Even where the carrier is under the qualified duty to use ordinary care, the injured railroad employee and his next of kin under the Federal Act have experienced much less difficulty in establishing that injury and death resulted, "in whole or in part" from the employer's negligence, than is met under the workmen's compensation system by a claimant in establishing that the accident arose "out of and in the course of employment." As Mr. Justice Murphy said:[83]

> The statutory phrase "arising out of and in the course of the employment," which appears in most workmen's compensation laws, is deceptively simple and litigiously prolific.

[76] *Ibid.*

[77] Acts of 9 & 10 GEO. 6, c. 62, 11 & 12 GEO. 6, c. 41. See BUTTERWORTH'S TWENTIETH CENTURY STATUTES 1592 (1948).

[78] BUTTERWORTH, *op. cit. supra*, at 1594, Historical Note.

[79] 27 STAT. 531 (1893), as amended, 45 U. S. C. §§1-46 (1946).

[80] 50 STAT. 307 (1937), as amended, 45 U. S. C. §238 *et seq.* (1946).

[81] 52 STAT. 1094 (1938), as amended, 45 U. S. C. §351 *et seq.* (1946).

[82] ALFRED F. CONARD AND ROBERT I. MEHR, COSTS OF ADMINISTERING REPARATION FOR WORK INJURIES IN ILLINOIS 9 (GRADUATE COLLEGE, UNIVERSITY OF ILLINOIS, 1952). See also Conard, *Workmen's Compensation: Is It More Efficient Than Employer's Liability?*, 38 A. B. A. J. 1011 (1952).

[82a] O'Donnell v. Elgin, Joliet & Eastern Ry., 338 U. S. 384 (1949).

[83] Cardillo v. Liberty Mutual Ins. Co., 330 U. S. 469, 479 (1947).

The truth of this statement is fully borne out by the space in the American Digest system required in the digest of workmen's compensation litigation—2253 pages in the Fourth Decennial and 3452 pages in the Fifth Decennial.

The litigious aspect of the workmen's compensation principle is not its worst feature. Its awards are wholly inadequate and its administration, according to the Illinois University study, is much more expensive than is the administration of the Federal Employers' Liability Act's methods and procedures.[84] Comparisons are not necessary here. Those who are interested in studies reflecting the adequacy of awards under the two systems are referred to volumes 1 to 9 of the *NACCA Law Journal* where awards under both systems are listed and appropriate comments are made.

The claimant under the FELA who takes his case to regional counsel of the Brotherhood or to any reputable, skilled and experienced lawyer will secure verdicts in court adequate to give him fair compensation for injury or death. The amounts recovered are sustained so long as they do not strike the court as monstrous. In *Affolder v. New York, Chicago and St. Louis Railroad,* where injuries resulted in the loss of one leg, the jury returned a verdict for $80,000.00. The United States Court of Appeals, Eighth Circuit had reversed.[85] The Supreme Court granted certiorari, and in reversing the judgment of the Court of Appeals, said:[86]

> We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case. *Barry v. Edmunds,* 116 U. S. 550 (1886). Accordingly, the judgment of the Court of Appeals is reversed and that of the District Court affirmed.

In such cases, when the injured man leaves regional counsel's office with his check, the amount of that check represents approximately 75 per cent of the amount recovered. When he leaves the office of any other skilled, experienced lawyer, the amount of his check represents from approximately 65 to 75 per cent of his recovery. This is true whether the amount recovered is by suit or in settlement.

The influence of affirmance of adequate verdicts and the settlements secured through able counsel, enables injured men and their next of kin to make many satisfactory settlements without the necessity of employing counsel. Conservatively, as a result of such verdicts and settlements in these cases, 95 per cent of claims are settled, either without suit, or if suit is brought, before the case goes to the jury. Moreover, what is still more important, the effect of these adequate settlements and verdicts is to cause the railroad employer to provide the highest safeguards to the lives and limbs of railroad workers that care, diligence, and efficiency can produce.

Any regional counsel or any other able and experienced attorney who handles these cases will testify that the number of cases in which no recovery can be had by reason of inability to prove negligence and that injury or death was due in whole or

[84] CONARD AND MEHR, *op. cit. supra* note 82, at 43, Table 7.
[85] 174 F. 2d 486 (8th Cir. 1948).
[86] 339 U. S. 96, 101 (1950).

in part to that negligence are small. Yet, the courts have not made this Federal Act into a workmen's compensation law.[87]

While government has rarely ever adopted a measure designed as a solution of some important social problem that could not be improved with time and experience, there has not yet been found any method of compensating injured railroad men and their next of kin that can be substituted satisfactorily for that provided by Congress in the FELA and the group of laws designed to supplement it. It has proved worthy to stand beside and in a position of equality with the remedies open to seamen, both in admiralty and in the law courts.

Since 1888, when, under Mr. Moseley's directions, scientific methods of keeping statistics of operative railroad casualties were adopted, there have been 125,000 operative railroad men killed and 4,293,326 injured in reportable accidents.[88] It is the personal, social and economic impact of this staggering human overhead of an industry, in which these millions suffered and died at their posts of duty, and in which their successors serve while faced with a similar fate, that has determined operative railroad men to fight for improvement in and for the preservation of this national public policy.

[87] *See* Myers v. Reading Co., 331 U. S. 477, 485 (1947); Wilkerson v. McCarthy, 336 U. S. 53, 61-62 (1948).

[88] INTERSTATE COMMERCE COMMISSION, ACCIDENT BULL. NO. 119 (APPENDIX A, SUMMARY STATEMENTS OF RAILWAY ACCIDENTS IN THE UNITED STATES FOR THE YEARS 1888-1950) 112 (1951).

THE QUEST FOR A FEDERAL WORKMEN'S COMPENSATION LAW FOR RAILROAD EMPLOYEES

CLARENCE A. MILLER*

Any symposium relating to the Federal Employers' Liability Act should, it would seem, include a consideration of the efforts which have been made during the past forty years to obtain legislation which would extend to railroad employees and their dependents the benefits of workmen's compensation based on the liability of the employer regardless of fault. The following is an attempt to present a brief history of those efforts.

At common law an employer was under the duty to protect an employee from injury while he was engaged in the performance of the operations of his job. At the same time, the employee assumed the normal risks inherent in the line of work he engaged to perform. In order to protect the employee from the hazards of his work, the employer was required to exercise due care to provide a safe place in which to work, keep the work area in reasonable repair for normal use, and make inspections frequently enough to insure that proper working conditions were being maintained. The employer was required to provide safe tools and appliances for the employee to use. The employer had the duty to warn of danger, when he knew or discovered it, and to formulate, display, and enforce such rules and regulations as would afford employees obeying them a reasonable degree of protection while in the performance of their duties. The employer was also under the obligation to use reasonable care in the selection of competent fellow servants and to select them in numbers sufficient to insure the safe performance of all assigned tasks. These duties, being the sole responsibility of the employer, could not ordinarily be delegated to another.[1]

At common law, the liability of employers arises only where it can be shown that their negligence was the proximate cause of the injury or disability sustained by their employees. Thus, at common law, where an employer fails to take the foregoing described precautions, he has not acted as a reasonable and prudent man would have done under similar circumstances and would be considered negligent in exercising his duty toward his employees. Under the common law, injuries and fatalities could not be compensated through the courts unless it could be proved that the employer was negligent.

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[1] Clark, *The Legal Liability of Employers for Injuries to Their Employees, in the United States* BUREAU OF LABOR STATISTICS BULL. No. 74 3-19 (1908).

The basis of any action under the FELA[2] is negligence on the part of the railroad, so that there is no liability unless and until negligence is proved to the satisfaction of the jury.[3] Workmen's compensation laws differ from the FELA in that the theory of a workmen's compensation law is that an employee is insured against the results of an injury received in the course of his employment, without reference to his contributory negligence, and without reference to common law liability. Workmen's compensation laws, being designed to give an injured worker prompt medical care and a reasonable part of the wages lost, at the expense of the employer, and to provide his dependents with reasonable sustenance during the loss of normal, expected wages, cover, in the majority of cases, the following fundamental points:

1. Provide certain, prompt and reasonable compensation to victims of work accidents and their dependents;

2. Free the courts from delay, cost, and the work load of mass personal injury litigation;

3. Relieve public and private charities of the financial drain caused by uncompensated industrial accidents;

4. Eliminate economic waste in payment of fees to lawyers and witnesses, and save the time ordinarily consumed by court trials and appeals;

5. Supplant concealment of fault in accidents by a frank study of causes, diminishing preventable accidents and reducing cost and suffering.

For many years the remedies for personal injuries of railroad employees engaged in interstate commerce were governed by the negligence laws of the various states. Congress, recognizing the difficulties under which railroad employees engaged in interstate commerce labored in obtaining redress for injuries, enacted the original Employers' Liability Act of June 11, 1906.[4] This Act abolished the "fellow servant" rule and modified the "contributory negligence" rule. That law, by its terms, was applicable to all employees of railroads engaged in interstate commerce, without regard to whether or not the particular employee, at the time of injury, was engaged in interstate commerce. The law was held unconstitutional in *Employers' Liability Act Cases*,[5] because, in the view of the Supreme Court of the United States, it transgressed upon powers reserved to the several states.

President Theodore Roosevelt, in a special message to the Congress, on January 31, 1908, said:[6]

> The Supreme Court has decided the employers' liability law to be unconstitutional because its terms apply to employees engaged wholly in intrastate commerce as well as to employees engaged in interstate commerce. By a substantial majority the Court holds that the Congress had power to deal with the question in so far as interstate commerce is concerned.
>
> As regards the employers' liability law, I advocate its immediate reenactment, limiting

[2] 35 STAT. 65 (1908), as amended, 45 U. S. C. §§51-60 (1946).
[3] Urie v. Thompson, 337 U. S. 163 (1949).
[4] 34 STAT. 232 (1906).
[5] 207 U. S. 463 (1908).
[6] 42 CONG. REC. 1347 (1908).

its scope so that it shall apply only to the class of cases as to which the Court says it can constitutionally apply, but strengthening its provisions within this scope. Interstate employment being thus covered by an adequate national law, the field of intrastate employment will be left to the action of the several States. With this clear definition of responsibility the States will undoubtedly give to the performance of their duty within their field the consideration the importance of the subject demands.

Congress, accepting the recommendations of the President, re-enacted the Federal Employers' Liability Act on April 22, 1908[7] and corrected the defect in the earlier law by expressly limiting its application to interstate railroad employees who, at the time of injury, were engaged in the interstate commerce business of the railroad. That law was amended by the Acts of April 5, 1910[8] and March 3, 1911,[9] and, again on August 11, 1939.[10]

Under the Act of April 22, 1908 it was generally supposed that the several states held concurrent jurisdiction with the Federal Government in applying the provisions of the law. Following a number of jurisdictional disputes in the courts, Congress clarified this aspect of the law by the amendment of April 5, 1910[11] which specified that the state courts would be vested with such concurrent jurisdiction.

The constitutionality of the Act of April 22, 1908[12] was sustained in *Second Employers' Liability Cases*.[13] With respect to the power of Congress, the Court said:

> . . . it does not admit of doubt that . . . Congress, in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employes, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employes are engaged.

Two years after the FELA of April 22, 1908 was passed, Congress created an "Employers' Liability and Workmen's Compensation Commission," under the chairmanship of Senator Sutherland, and instructed it to study the whole problem of liberalizing statutory remedies for injured railroad employees.[14] This commission has since been known as the "Sutherland Commission."

Early in its study the Sutherland Commission became convinced that the FELA did not offer the caliber of relief to which injured railroad employees (as covered by the law) were entitled, especially since the principles of workmen's compensation, as being studied by other states and commissions, offered a more equitable system of compensation for occupational injuries. The Sutherland Commission, therefore, directed its efforts primarily toward the possibility of developing an acceptable

[7] 35 STAT. 65 (1908), as amended, 45 U. S. C. §§51-60 (1946).
[8] 36 STAT. 291 (1910), 45 U. S. C. §56 (1946).
[9] 36 STAT. 1167 (1911), 45 U. S. C. §56 (1946).
[10] 53 STAT. 1404 (1939), 45 U. S. C. §§51-60 (1946).
[11] 36 STAT. 291 (1910), 45 U. S. C. §56 (1946).
[12] 35 STAT. 65 (1908), as amended, 45 U. S. C. §§51-60 (1946).
[13] 223 U. S. 1, 48-49 (1912).
[14] Joint Resolution of Congress, approved June 25, 1910, 36 STAT. 884. See I SUTHERLAND COMMISSION REPORT 11, *infra*, note 15.

workmen's compensation law applicable to railroad employees.[15] Among those who appeared before the Sutherland Commission in favor of a workmen's compensation law for interstate railroad employees was Mr. Miles M. Dawson, a New York attorney and consulting actuary, who had made studies abroad for the Russell Sage Foundation, and who later made studies for the United States Bureau of Labor Statistics on the subject of costs of employers' liability and workmen's compensation in foreign and American governments.[16] Mr. Dawson asserted:[17]

> Upon no theory can workmen's compensation ever be justified except upon the economic theory that the cost of all industrial accidents should enter into the price of the products and be paid by the consumers of the product, or into the price of the services and be paid by the consumers of the services.

The Sutherland Commission recommended a bill to provide an exclusive remedy and compensation for accidental injuries resulting in disability or death to employees of common carriers by railroad engaged in interstate or foreign commerce or in the District of Columbia. The bill worked out in detail a compensation for such injuries or death. Compensation was to be made in the form of annual payments for a number of years or for life. The fees to be paid to attorneys were to be specifically limited. The remedies were to be exclusive of any other remedies.

President Taft submitted the report of the Sutherland Commission to the Congress on February 20, 1912, saying:[18]

> I sincerely hope that this act will pass. I deem it one of the great steps of progress toward a satisfactory solution of an important phase of the controversies between employer and employees that has been proposed within the last two or three decades. The old rules of liability under the common law were adapted to a different age and condition and were evidently drawn by men imbued with the importance of preserving the employers from burdensome or unjust liability. It was treated as a personal matter of each employee, and the employer and the employee were put on a level of dealing, which, however it may have been in the past, certainly creates injustice to the employee under the present conditions.

The bill recommended by the Sutherland Commission was passed by the Senate and by the House, but in different language. It was then sent to conference committee so as to iron out the differences between the bill as passed by the Senate and as passed by the House. However, the bill never came out of conference committee because representatives of the railway labor unions could not agree on acceptable terms.[19]

[15] The Report of the Sutherland Commission is entitled "Report of Commission to Investigate the Matter of Employers' Liability and Workmen's Compensation." It was published, in two volumes, as SEN. DOC. No. 338, 62d Cong., 2d Sess. (1912) [hereinafter SUTHERLAND COMMISSION REPORT].

[16] *Cost of Employers' Liability and Workmen's Compensation Insurance*, BUREAU OF LABOR STATISTICS BULL. No. 90 749-831 (1910).

[17] II SUTHERLAND COMMISSION REPORT 68.

[18] 48 CONG. REC. 2228 (1912); I SUTHERLAND COMMISSION REPORT 7.

[19] The history of that bill should be briefly recorded. After being favorably reported by the Senate Committee on the Judiciary (48 CONG. REC. 4232, 4643 (1912); SEN. REP. No. 553, 62d Cong., 1st Sess.), it was debated at length in the Senate, amended and passed on May 6, 1912 by a vote of 64

The causes of the disagreement among the railway labor unions which resulted in the defeat of the Sutherland bill are important. A number of young, totally disabled railroad employees had studied law and become members of the bar. Because of their railroad experience they gravitated to cases involving injured railroad employees. By remaining members of the railway labor organizations they frequently were selected as delegates to the annual conventions of those organizations. In those conventions, when questions about federal workmen's compensation laws were discussed, they would lead the attempt to defeat such proposals, and they exercised a very considerable amount of influence.[20] These personal injury case lawyers, by obtaining occasional awards of substantial amounts of damage, were able to convince the railroad employees that the FELA was superior to any federal workmen's compensation law. Of course, the employees were not informed of the large number of cases in which no awards were obtained, or of the fact that in most cases of accident negligence of the railroad could not be shown. However, the employees preferred to gamble with damage suits rather than with the benefits of a federal workmen's compensation law.[21]

Litigation involving the question whether a particular employee was, at the time of injury, engaged in interstate commerce, was enormous, particularly in view of the fact that both federal and state courts could make the determinations. The problem of jurisdictional conflicts was reviewed in 1917 by Professor Willard C. Fisher of New York University, who suggested that a federal workmen's compensation law, giving concurrent jurisdiction to the several states, might be a solution, although he favored complete coverage for all interstate commerce employees under a federal workmen's compensation law to be administered exclusively by the federal government.[22]

On October 22-23, 1917, the Committee on Jurisdictional Conflicts of the International Association of Industrial Accident Boards and Commissions met with representatives of the railroads, the railway labor organizations, and the American Electric Railway Association for the purpose of determining the kind of a workmen's compensation law that would be most acceptable to the employees of carriers by railroad engaged in interstate commerce. As was to be expected, considerable

to 15 (48 CONG. REC. 5958-5959 (1912)). It was favorably reported by the House Committee on the Judiciary (49 CONG. REC. 2580 (1913), H. R. REP. No. 1441, 62d Cong., 2d Sess.), and passed by the House with amendments on March 1, 1913, by a vote of 218 to 81 (49 CONG. REC. 4547 (1913)). A motion to concur in the House amendments was debated at length in the Senate (49 CONG. REC. 4562-4563, 4673-4675, 4676-4677 (1913)). The bill, however, was lost in the legislative rush on March 3, 1913, because of lack of time for discussion of amendments before the closing of that session of Congress (49 CONG. REC. 4677 (1913)).

[20] BUREAU OF LABOR STATISTICS BULL. No. 42 42-44 (1902).

[21] See Lorce, *Railway Employer Favors Workmen's Compensation*, 23 AM. LAB. LEG. REV. 110 (1933); Clark, *Workmen's Compensation and the Railroads: A Hesitating Revolution*, 41 J. POLIT. ECON. 806 (1933); Clark, *Employees Engaged in Interstate and Foreign Commerce*, 9 MONTHLY LAB. REV. 294 (Nov. 1919). The *Monthly Labor Review* is published by the U. S. Department of Labor, Bureau of Labor Statistics.

[22] Fisher, *Some Defects and Suggested Changes in Workmen's Compensation Laws*, in PROCEEDINGS OF THE CONFERENCE ON SOCIAL INSURANCE, BUREAU OF LABOR STATISTICS BULL. No. 212 369 (1917).

differences of opinion arose, particularly over the suggestion to draft a workmen's compensation law for operating employees.[23] There was also opposition with respect to amending the FELA of 1908 so as to give the operating employees the right to elect to sue for negligence under the FELA or to accept the benefits of the workmen's compensation laws of the state where the injury occurred. Among those dissatisfied with the suggestion was Colonel Alfred P. Thom, general counsel for the Railway Executives' Advisory Committee. However, it was decided to draft two bills, one for an amendment of the FELA of 1908, and the other a separate act to accomplish the same general result. It was also decided to gather additional information so as to determine just how many railway employees had no remedies for their injuries either under the FELA because the employer was not at fault, or under the workmen's compensation laws of the state where the injury occurred.[24]

Later, in 1918, it was revealed that a "gentlemen's agreement" existed between an important railroad and its employees whereby the employees agreed not to sue for damages in cases where the possibility of proving negligence was admitted, the railroad agreeing that the injured employee would be paid compensation on the same basis as if he were covered by the compensation laws of the state in which the injury occurred. At that time less than half of the states granted benefits under their workmen's compensation laws sufficient to do little more than cover the total cost of hospital and surgical treatments.[25]

Jurisdictional conflicts were not the sole factors in influencing operating employees against workmen's compensation legislation. Two other factors were admittedly consequential. The first of these was the general unfamiliarity of the employees with the principles of workmen's compensation. The second was the vested interest of the lawyers for the railway labor organizations in the continuation of the liability system. These factors were stressed by a former member of the Sutherland Commission, then editor of *The Railroad Trainman*, in 1919, when he advised the delegates to the Convention of Compensation Administrators of the attitude of the trainmen's unions toward workmen's compensation. He expressed the view that the operating employees did not understand what they were asking for when the Sutherland bill was proposed, and that they were easily influenced by their lawyers who presented a reasonable case against compensation loss.[26]

The following were among the arguments used to defeat the Sutherland bill:

1. The employees were denied the right to sue the employer, even when the employer was actually at fault, in consideration of being guaranteed a stated sum for each injury, regardless of who was at fault. The lawyers suggested that if the bill be passed, it should be made elective and not compulsory. In that event the em-

[23] Employees engaged in train and engine service, such as engineers, firemen, conductors, brakemen, switchmen, etc.

[24] 5 MONTHLY LAB. REV. 152-157 (Dec. 1917).

[25] Pillsbury, *Conflicts Between Federal and State Jurisdictions in Accident Cases*, BUREAU OF LABOR STATISTICS BULL. No. 248 229 (1919).

[26] Cease, *Attitude of Railroad Transportion Organizations Toward Federal Compensation*, 9 MONTHLY LAB. REV. 311 (Nov. 1919).

ployee could then choose his remedy *after the injury*, so that in cases of negligence the lawyers would still be able to prosecute liability cases.

2. The compensation rate was based upon the *normal daily wage* instead of *the monthly wage* which was higher because it included overtime.

3. The accurate determination of wage loss in permanent partial disability is virtually impossible, and it would, therefore, be an injustice to delegate authority to any agency to fix payments based upon an observation of what a man might earn in another employment.

4. Men receiving compensation might be forced to work during strikes or lose their benefits.

5. The small fixed amounts for permanent partial disability were insignificant when compared with the substantial amounts awarded by juries in actions under the FELA.

6. At the expiration of compensation benefits, the employee would be worse off than before.

The position of the transportation organizations (operating employees) toward workmen's compensation legislation ranged from open and determined opposition to any form of federal workmen's compensation,[27] to that of apparent indifference,[28] to general support of the Sutherland bill.[29]

In 1920, one workmen's compensation law administrator said:[30]

> The Federal [Employers' Liability] Act, while admirable as an improved negligence statute, is, of course, wholly out of date at the present time, the States in their passage of workmen's compensation acts having far exceeded the relief afforded by the Federal Government by this statute. The great need now is to give railroad employees the same protection under workmen's compensation acts as employees in the more liberal States enjoy. This can be done either by the repeal of all Federal legislation on the subject, leaving railroad interstate employees to the protection of State laws, necessarily divergent, or by the enactment by Congress of a uniform Federal compensation act for railroad employees in interstate commerce.

Administrators of state workmen's compensation laws, who worked with the problems of compensating disabled employees on a day-to-day basis, became much concerned about the implications of jurisdictional conflicts.

In 1922, Samuel Gompers, as President of the American Federation of Labor, was authorized at the annual convention of the organization to establish a committee to study the status of the employer liability and workmen's compensation laws with reference, among other things, to conflicting interpretations of state and federal laws. That committee, consisting of Messrs. William Green, Frank Duffy, and

[27] Brotherhood of Railroad Trainmen.

[28] Brotherhood of Locomotive Firemen and Enginemen, and Order of Railway Conductors.

[29] Brotherhood of Locomotive Engineers.

[30] French, *The Trend of Workmen's Compensation—A Glance at Compensation History, Past and Present*, 11 MONTHLY LAB. REV. 1, 6 (NOV. 1920).

Matthew Woll, reported to the 1923 convention of the American Federation of Labor at Portland, Oregon, that:[31]

> . . . the courts have held in construing the interstate commerce section of the Constitution of the United States, that persons employed by common carriers, engaged in transporting interstate commerce cannot come within the scope of or become subject to the operation of the State workmen's compensation laws.
>
> Obviously the remedy for this state of affairs is the enactment of a federal workmen's compensation law applicable to those persons engaged in interstate commerce and who come wholly within the federal jurisdiction.
>
> We believe such legislation should define clearly the class of employers and employees who are subject thereto and should be similar to the Ohio workmen's compensation law which the American Federation of Labor has officially accepted as the standard act in this character and kind of legislation.

During 1924 there was a conference held with railroad representatives by a joint committee from the American Association for Labor Legislation and the International Association of Industrial Accident Boards and Commissions. That conference developed the fact that the operating railway labor organizations were still not in sufficient agreement to support a federal workmen's compensation law.[32] The conference idea was not abandoned, and at the 1925 meeting of the Compensation Administrators a motion was adopted to the effect that a committee of that association be appointed to confer with parties interested and take such steps as in its judgment might seem wise "in order to bring about a remedial condition for employees of railroad companies engaged in interstate commerce."[33] At the 1926 meeting of the Compensation Administrators, the Committee on Compensation Legislation for Interstate Commerce Employees submitted a "progress report" revealing that opinion between railroad and harbor workers was then still divided as to the desirability of a uniform federal workers' compensation law.

The first industrial accident compensation laws were written upon the theory that both railroad workers and harbor workers would be included under state laws, since they were generally engaged in work presumably of a local nature, paid local taxes, owned local homes, and would become charges of local charities in cases where relief for disability was denied or discontinued.[34] However, in *New York Central R. R. v. Winfield*,[35] and *Southern Pacific Company v. Jensen*,[36] it was held that neither interstate commerce workers nor maritime employees may come under the jurisdiction of state compensation laws if the work being performed at the moment of injury involved elements over which the federal government has exclusive jurisdiction. In the *Winfield* case it was held that the entire subject of the liability of interstate railway carriers for the death or injury of their employees while employed by them in interstate commerce is so completely covered by the provisions of the

[31] REPORT OF THE PROCEEDINGS OF THE FORTY-THIRD ANNUAL CONVENTION OF THE AMERICAN FEDERATION OF LABOR 76, 78 (1923).
[32] BUREAU OF LABOR STATISTICS BULL. No. 432 44 (1926).
[33] *Id.* BULL. No. 406, at 150.
[34] *Id.* BULL. No. 432, at 43.
[35] 244 U. S. 147 (1917).
[36] 244 U. S. 205 (1917).

FELA as to prevent any award under the New York Workmen's Compensation Act where an employee was injured or killed without fault on the part of the railway company while he was engaged in interstate commerce.

The Committee on Compensation Legislation for Interstate Commerce Employees, heretofore referred to, in its first "progress report," reviewed the many futile attempts previously made to push federal workmen's compensation bills through Congress, because of early adjournments or of irreconcilable differences between the two houses of the Congress.[37]

By 1928 the continued adamant opposition of certain railway labor organizations toward a federal workmen's compensation law made the situation so discouraging that the Commissioner of the Bureau of Labor Statistics suggested that the International Association of Industrial Accident Bureaus and Commissions drop the subject.[38] However, in 1928 the Brotherhood of Locomotive Firemen and Enginemen appointed a special committee to study the problem of adapting the principle of workmen's compensation to injuries of trainmen. That committee reported that:[39]

> Through adverse decisions of the courts, the present Federal Employers' Liability Act has been emasculated and it now affords relatively little relief to our injured members. While it is true that in comparatively few individual instances rather large sums are recovered as a result of verdicts secured through the courts, the fact remains that in a vast number of cases no relief is afforded through this medium. There are a number of reasons why our members are unable to take advantage of the present law in this respect, among them being (1) lack of funds with which to carry on the required litigation; (2) fear of loss of position if court action is taken, etc. The situation as a whole seems to point to the necessity for a law that will more adequately and effectively take care of injured employees.
>
> We respectfully recommend that the International President be authorized to take this matter up with the Railway Labor Executives' Association for the purpose of determining the advisability of securing a Federal Compensation Law applicable to men in interstate commerce, and for the further purpose of jointly instituting a movement, along with other interested organizations, for the purpose of securing a National Compensation Law that will effectively and adequately protect our injured members in interstate commerce.

Donald R. Richberg, for many years counsel for certain of the railway labor organizations, in an article entitled "Advantages of a Federal Compensation Act for Railway Employees," in 1931 said:[40]

> . . . the relief afforded by the Federal Liability Act is limited largely to those cases in which an employee is so severely injured that he is willing to gamble the cost of an expensive litigation; and is ready at the same time to abandon any future possibility of employment by the railroad.

Mr. Richberg then discussed briefly some of the advantages of a federal workmen's compensation law, and with particular respect to the railroad industry he

[37] BUREAU OF LABOR STATISTICS BULL. No. 432, 49-50 (1926).
[38] *Id.* BULL. No. 456, at 173 (1928).
[39] 18 AM. LAB. LEG. REV. 341, 342 (1928).
[40] 21 AM. LAB. LEG. REV. 401, 402 (1931).

said that such a system would tend to reduce strained employer-employee relations, virtually eliminate the expenses inherent in the litigation system, provide the employee with better and immediate medical care, hasten his return to a useful and efficient work status following temporary disability, and afford him a reasonable measure of protection in cases of total disability and occupational disease.[41] Mr. Richberg suggested one of two laws might be passed—namely, (1) one to cover injured railway workers "when engaged in interstate commerce," or (2) the other to apply "at all times to all employees engaged in interstate commerce." He suggested the former only to insure its constitutionality, but he said that the latter would be much preferable because it would operate uniformly and eliminate any possibility of a twilight zone between state and federal jurisdiction.

The attitude of the majority of the trainmen toward a uniform federal workmen's compensation law remained unfavorable despite a steady increase in benefits under workmen's compensation laws which had been voted by several of the states. The rather liberal Longshoresmen's and Harbor Workers' Compensation Act of March 4, 1927[42] had not changed their attitude. The prevailing attitude of the trainmen was explained to the International Association of Industrial Accident Boards and Commissions, in 1931 by the then Secretary of Labor, Hon. W. N. Doak, in these words:[43]

> The Brotherhood of Railroad Trainmen, whom I had the honor of representing as an officer for many years, has taken a consistent attitude in opposition to a workmen's compensation law since it was first presented to a convention of the Brotherhood more than eighteen years ago . . . When it was proposed to abrogate the Federal employers' liability act and enact in its stead a national compensation measure, discussion among the railroad employees of all kinds in this country became active and occasionally vehement . . . [the Sutherland bill] was favored, I believe, by a majority of the railroad brotherhoods, but opposed by the Brotherhood of Railroad Trainmen, with the result that it did not become a law.
>
> Since the first action was taken by the convention of railroad trainmen, subsequent conventions of that organization have reaffirmed the opposition to workmen's compensation, and have actively opposed its enactment up to and including the last convention, which was held early this year.

After listing some eleven basic reasons for the opposition to workmen's compensation by the trainmen, Mr. Doak said:[44]

> Therefore, unless and until radical reforms in systems already adopted are made, schedules more wisely increased, with the aim of affording redress of a more reasonable character to the men engaged in these hazardous occupations, I am seriously of the opinion that the railroad trainmen will oppose workmen's compensation as the sole and exclusive remedy.

The American Association for Labor Legislation disclosed that an agreement had

[41] *Id.* at 403-404.

[42] 44 STAT. 1424 (1927), 33 U. S. C. §§901 *et seq.* (1946).

[43] *The Attitude of the Railroad Brotherhoods Toward Workmen's Compensation and the Reason for Such Attitude*, BUREAU OF LABOR STATISTICS BULL. No. 564 53 (1932).

[44] *Id.* at 57.

been signed on January 31, 1932 between representatives of the railway labor unions and the railroads containing a provision that some form of elective workmen's compensation would be studied by a joint committee composed of representatives of several of the participating railroads and a committee appointed by the Railway Labor Executives' Association, with the understanding that the agreement for the study did not commit either party to accept or to await the results of the study.[45]

In March, 1932, Representative Swanson introduced H. R. 12170 (72nd Congress, 2d Session), providing that the FELA should not apply with respect to causes of action arising in any state, if, but for the enactment of such act, the provisions of the workmen's compensation law of such state would be applicable. This bill received no action by the Congress.

In June, 1932, Senator Wagner introduced S. 4927 (72nd Congress, 2d Session) to provide compensation for disability and death resulting from injury to employees in interstate commerce. S. 1320 (73d Congress, 1st Session), and S. 3630 (73d Congress, 1st Session), also introduced by Senator Wagner, were substantially similar to S. 4927. As to these bills, Secretary Andrews of the American Association for Labor Legislation explained:[46]

> In order that a concrete plan might be available for distribution and study, Senator Wagner, in June 1932, introduced in Congress the interstate compensation bill of the American Association for Labor Legislation, which was prepared in cooperation with compensation law administrators. Copies of this bill were widely distributed for criticism and suggestions. When revised the bill was reintroduced by Senator Wagner in February 1933, and again in April of that year. Under the auspices of the American Association for Labor Legislation, an all-day conference was held in November 1933, in which representatives of railroad carriers and railroad unions participated. At another all-day conference, arranged upon request of the railroad labor organizations, the bill was critically examined in every detail. With further revision, the bill was reintroduced in May 1934. . . .

Senator Wagner requested the Federal Coordinator of Transportation to make a new study of the cause of railway accidents so that the most appropriate means of compensating injured employees of interstate carriers could be determined. A comprehensive survey was made by the Federal Coordinator of Transportation, the results being incorporated in his report entitled "Cost of Railroad Employee Accidents, 1932."[47]

This report showed that, for the year 1932, there were 35,575 cases of injuries or deaths reported as closed out. Nearly one-half of these, or 16,876, were closed in 1932 without the employee, or his beneficiary in case of death, receiving any financial compensation. Of the 18,699 cases closed with payments, only 283, or 1.5 per cent, were presented to the federal courts, resulting in judgments amounting to $1,377,717, or 11 per cent of the total cost of $12,061,173 for 1932 railroad accidents. This gave

[45] 22 AM. LAB. LEG. REV. 57 (1932).

[46] *Interstate Compensation for Transportation Workers*, BUREAU OF LABOR STANDARDS BULL. NO. 4 (DISCUSSION OF INDUSTRIAL ACCIDENTS AND DISEASES) 172 (1935).

[47] SEN. DOC. NO. 68, 74th Cong., 1st Sess. (1932).

an average cost of $4,727 per case decided by the courts. State compensation boards handled 3,868 cases, or 20.7 per cent of the total cases settled with payments, and awarded a total of $1,801,747, or 14.9 per cent of the total cost for the year, the average award being $466 per case. Settlements out of court accounted for 14,548 cases, or 77.8 per cent of the total cases settled with payments. The amount paid in settlements was $8,921,709, or an average cost of $613 per case. When these figures are compared with those in the report of the Sutherland Commission covering the period 1908-1910, it will be seen that while the number of accidents had decreased some 30 per cent, the cost had increased about 20 per cent. These increased costs, of course, reflected increases in payments for major injuries and death cases.

The figures produced by the report of the Federal Coordinator of Transportation indicated that railroad employees generally would receive better compensation under workmen's compensation laws than under the FELA. In the report, it is said that:[48]

> The great majority of railroad-employee cases are settled without recourse to the courts, and the payments made are often less than similar awards under adequate workmen's compensation laws. As a result, the railroad-accident compensation system takes on many of the aspects of a lottery, from which a few employees draw large sums but from which many receive insufficient awards. It is this inequity which constitutes the greatest indictment of the system and furnishes the most powerful argument in favor of a reasonable Federal workmen's compensation law.

In introducing S. 1320 in the Senate on April 13, 1933, Senator Wagner referred to the prior history of the Sutherland bill:[49]

> Twenty years ago a congressional committee reported voluminously in favor of a workman's compensation act for railway employees injured in interstate commerce. There was substantial agreement between railroad employers and railroad workers in favor of compensation legislation, but the official commission bill, although passed in modified form by both Houses of Congress, was permitted to die.

Speaking of the widespread acceptance of the principle of compensation, he went on to say:[50]

> Meanwhile workmen's compensation has been almost universally adopted in this country to replace the antiquated system of employers' liability suits for damages. Interstate commerce employees comprise the most important group of workers remaining without this modern protection, which experience has demonstrated to be for the best interests of employers, employees, and the whole community.

After conferences with representatives of the United States Department of Labor and the Federal Coordinator of Transportation, Senator Wagner introduced, on June 25, 1935, S. 3152 (74th Congress, First Session). At the time he introduced this bill he said:[51]

> The inadequacies and evils of the existing system of employers' liability for interstate commerce workers indicate the necessity for modern legislation to meet present-day needs

[48] *Id.* at 5-6.
[49] 77 CONG. REC. 1624 (1933).
[50] *Ibid.*
[51] 79 CONG. REC. 10029-10030 (1935).

which will effectively and adequately protect all interstate-commerce carriers' employees who are injured in the course of their employment. Such legislation can be worked out to the advantage of employers and employees and will at the same time relieve the public of the various expenses growing out of litigation.

A short while before that, in December 1934, Mr. George M. Harrison, President of the Brotherhood of Railway and Steamship Clerks, and Acting Chairman of the Railway Labor Executives' Association, in an article entitled "Railway Labor Favors Federal Accident Compensation Law,"[52] said that though railway labor organizations constantly have taken the lead in pushing labor legislation through Congress, they have a very poor record with respect to getting a federal compensation law to protect the railway employees when injured while working in the line of duty. He said:[53]

> The fault lies largely with railway employees themselves. . . . There are still some railroad labor organizations that think an injured employee should have the right to make a choice as between compensation and the right to sue, but these organizations are in the minority.

Then, he said, "a very substantial majority of the unions [are] convinced of the advantages of a compensation act," and that for this reason he believed Congress would "enact such a measure without much delay."

In 1935 the President's Committee on Economic Security recommended "passage of accident compensation acts for railroad employees."[54]

Mr. L. F. Loree, then President of the Delaware and Hudson Railroad Corporation, had, in 1933, discussed the problem of many railroads with respect to the dual standard under which employees must be compensated for certain of their injuries. He had said:[55]

> The same railroads that compensate their state employees in this manner [under State compensation laws] have, in cases of accidents to interstate employees, to meet highly organized attacks of attorneys who often make exorbitant profits from the exploitation of such accidents. The result is that, in these cases, the railroads pay much more than they should in justice be required to pay, while the injured employees and their dependents receive less than they would under the compensation laws of most states.

Mr. Loree indicated that the railroad industry was growing tired of this double standard of liability and promises, saying:[56]

> . . . that if there were any genuine prospect of obtaining a suitable Federal statute of the same character there would be little, if any, opposition from railroad employers.

The first Railroad Retirement Act was held invalid by the Supreme Court of the United States on May 6, 1935. The majority of the Court, speaking through Mr. Justice Roberts, said:[57]

[52] 24 AM. LAB. LEG. REV. 161 (1934). [53] *Id.* at 161-163.
[54] REPORT TO THE PRESIDENT OF THE COMMITTEE ON ECONOMIC SECURITY 46 (1935).
[55] *Railway Employer Favors Workmen's Compensation*, 23 AM. LAB. LEG. REV. 110 (1933).
[56] *Id.* at 111.
[57] Railroad Retirement Board v. Alton R. R., 295 U. S. 330, 370 (1935).

That Congress may, under the commerce power, prescribe an uniform rule of liability and a remedy uniformly available to all those so engaged, is not open to doubt. The considerations upon which we have sustained compulsory workmen's compensation laws passed by the states in the sphere where their jurisdiction is exclusive apply with equal force in any sphere wherein Congress has been granted paramount authority. Such authority it may assert whenever its exercise is appropriate to the purpose of the grant. A case in point is the Longshoremen's and Harbor Workers' Compensation Act, passed pursuant to the delegation of admiralty jurisdiction to the United States. Modern industry, and this is particularly true of railroads, involves instrumentalities, tasks and dangers unknown when the doctrines of the common law as to negligence were developing. The resultant injuries to employees, impossible of prevention by the utmost care, may well demand new and different redress from that afforded in the past.

Taking cognizance of the argument that insuring risks tends to make an employer relax his vigilance over safety measures on the grounds that no matter what happens the insurance company will take care of it, the majority of the Court said:[58]

By the very certainty that compensation must be paid for every injury such legislation promotes and encourages precaution on the part of the employer against accident and tends to make transportation safer and more efficient. The power to prescribe an uniform rule for the transportation industry throughout the country justified the modification of common law rules by the Safety Appliance Acts and the Employers' Liability Acts applicable to interstate carriers, and would serve to sustain compensation acts of a broader scope, like those in force in many states.

Applying what the Court here said to the provisions of Senator Wagner's bill, one well-known writer reached the conclusion that the Supreme Court would sustain its enactment as a valid exercise of the power of Congress.[59] He specially pointed to this language of the majority opinion of the Court in the *Alton* case:[60]

In dealing with the situation it is permissible to substitute . . . a fixed and reasonable compensation commuted to the degree of injury; to replace uncertainty and protracted litigation with certainty and celerity of payment; to eliminate waste; and to make the rule of compensation uniform throughout the field of interstate transportation, in contrast with inconsistent local systems.

In the dissenting opinon of Chief Justice Hughes in the *Alton* case, he said:[61]

Interstate carriers cannot conduct their interstate operations without general officers and their staffs, without departments for major repairs and those for administering finances and keeping accounts. General management is as important to the interstate commerce of the carriers as is the immediate supervision of traffic, and the proper maintenance of equipment and the handling of moneys and the keeping of books are as necessary as the loading and moving of cars.

Senator Wagner continued to advocate his bill. In a paper submitted to the

[58] *Id.* at 370-371.

[59] Gellhorn, *Federal Workmen's Compensation for Transportation Employees*, 43 YALE L. J. 906 (1934), and *Validity of Federal Compensation for Transportation Employees*, 25 AM. LAB. LEG. REV. 71, 74 (1935).

[60] Railroad Retirement Board v. Alton R. R., 295 U. S. at 370.

[61] *Id.* at 389.

twenty-ninth annual meeting of the American Association for Labor Legislation, on December 28, 1935, he said:[62]

> It is strange that a protective movement like workmen's compensation, which gained such a headstart and received such widespread acceptance in this country, should not at once have sheltered the field of interstate transportation.

Commenting upon the fact that many railway employees "have been misled by the spectacular recoveries awarded in a few extraordinary court actions," he said that:[63]

> . . . the focus of attention upon the rare case that an employee can take to court and win in court, obscures the all-important information about what is happening in the overwhelming majority of cases.

In the meantime, he had reintroduced his bill without being able to get any action on it.[64]

In introducing S. 3152 in the Senate on June 25, 1935, Senator Wagner quoted Chief Justice Taft in an address made by the latter on May 9, 1932, before the American Law Institute:[65]

> A good many years ago it was attempted in Congress to provide a workmen's compensation act or what was equivalent to it, with reference to that great body of men whose lives are constantly at stake in the operation of the transportation systems We in the Supreme Court and all judges who have to do with the active conduct of litigation, realize the amount of time that is taken up in litigation of that kind, and also realize how much has been saved to the courts of the country by workmen's compensation acts. But we have no such system in the Federal Courts. We need it.

Senator Wagner also referred to the decision of the United States Supreme Court in *Railroad Retirement Board v. Alton R. R.*, in which Mr. Justice Roberts pointed out the need of a compensation system for the railroad industry, and quoted Mr. Justice Robert's opinion as follows:[66]

> Every carrier owes to its employees certain duties the disregard of which render it liable at common law in an action sounding in tort. Each state has developed or adopted, as part of its jurisprudence, rules as to the employer's liability in particular circumstances. These are not the same in all the states. In the absence of a rule applicable to all engaged in interstate transportation the right of recovery for injury or death of an employee may vary depending upon the applicable state law. . . . Modern industry, and this is particularly true of railroads, involves instrumentalities, tasks and dangers unknown when the doctrines of the common law as to negligence were developing. The resultant injuries to employees, impossible of prevention by the utmost care, may well demand new and different redress from that afforded in the past. In dealing with the situation it is permissible to substitute a new remedy for the common law right of action; to deprive the

[62] *Federal Workmen's Compensation for Transportation Workers*, 26 AM. LAB. LEG. REV. 15 (1936).
[63] *Id.* at 18.
[64] S. 5695, 72d Cong., 1st Sess. (1933); see 76 CONG. REC. 5069 (1933). S. 2793, 74th Cong., 1st. Sess. (1935); see 79 CONG. REC. 7198 (1935).
[65] 79 CONG. REC. 10029-10030 (1935).
[66] 295 U. S. 330, at 369-371.

employer of common law defenses and substitute a fixed and reasonable compensation commuted to the degree of injury; to replace uncertainty and protracted litigation with certainty and celerity of payment; to eliminate waste; and to make the rule of compensation uniform throughout the field of interstate transportation, in contrast with inconsistent local systems. By the very certainty that compensation must be paid for every injury such legislation promotes and encourages precaution on the part of the employer against accident and tends to make transportation safer and more efficient. . . . Liability in tort is imposed without regard to such considerations; and in view of the risks of modern industry the substituted liability for compensation likewise disregards them. Workmen's compensation laws deal with existing rights and liabilities by readjusting old benefits and burdens incident to the relation of employer and employee. Before their adoption the employer was bound to provide a fund to answer the lawful claims of his employees; the change is merely in the required disbursement of that fund in consequence of the recognition that the industry should compensate for injuries occurring with or without fault.

Senator Wagner continued:[67]

From the general welfare angle, this problem has been discussed from time to time during the 23 years since Congress first attempted to pass legislation on the subject. At a joint meeting of representatives of railway operators and railway unions at Chicago in January, 1932, steps were taken looking toward the earnest consideration of action by Congress on a Federal workmen's compensation law for employees of interstate common carriers. Looking toward more adequately meeting the hazard of industrial accidents, the Committee on Economic Security, in its report to the President on January 15th of this year, recommended that an accident compensation act for railroad employees be adopted.

After describing the administrative provisions of the bill, Senator Wagner continued:[68]

The inadequacies and evils of the existing system of employers' liability for interstate commerce workers indicate the necessity for modern legislation to meet present-day needs which will effectively and adequately protect all interstate-commerce carriers' employees who are injured in the course of their employment. Such legislation can be worked out to the advantage of employers and employees and will at the same time relieve the public of the various expenses growing out of litigation.

Despite all of Senator Wagner's efforts, however, no result ever came of them. None of the seven bills was ever reported out of committee. This failure was apparently due to a sharp difference of opinion on the bills.

Senator Wagner reintroduced his bill in the Seventy-Sixth Congress, on July 21, 1939, as S. 2862.[69] This bill was "to provide compensation for disability or death resulting from injury to employees of interstate carriers." In this bill most of the provisions of the New York State Workmen's Compensation Law were lifted bodily, or modified where necessary to accord with a nation-wide coverage and federal procedure. However, where there were provisions in the laws of some of the other states more favorable to the beneficiaries of such an act, they were substituted for the same provisions in the New York law or the other laws from which the bill was

[67] 79 CONG. REC. 10030 (1935). [68] *Ibid.*
[69] S. 2862, 76th Cong., 1st Sess. (1939); 84 CONG. REC. 9650 (1939).

copied. This bill would, if enacted into law, have been administered by the Railroad Retirement Board.

By this time most of the operating railway labor organizations favored a federal workmen's compensation law "in principle." However, the Brotherhood of Railroad Trainmen continued to oppose this type of legislation, preferring to remain under the FELA, but with a broadening of that law. They maintained this position despite the fact that every study that had been made tended to show that workmen's compensation would be more beneficial to the majority of railroad employees than the FELA. Commenting upon this situation, *The Railway Clerk*, the official organ of the Brotherhood of Railway and Steamship Clerks, etc., in its issue for August 1939, said:[70]

> Nor can the failure to protect workers in interstate commerce be fairly laid at the door of Congress. As early as 1912 a Federal law for the protection of workers in interstate commerce passed both Houses of Congress, but due to the failure of the railroad unions to energetically push for its passage, it perished because of a failure to iron out differences between the Senate and House bills. The passage of almost 30 years does not seem to have altered perceptibly the line-up at that time.
>
> The trouble lies in the inability of the railroad unions to get together on a program. Although 19 of 21 railroad unions have approved passage of workmen's compensation laws, and the other two have approved such bills in principle, the fact remains that almost three decades have gone by without any action to protect transportation workers against accidents falling under such laws.
>
> Those who favor retention of the present Federal Employers' Liability Act have been deluded by the ease of securing jury verdicts for large amounts in damages in the lower courts, for a case is hardly ever decided against an employee. But this advantage is counterbalanced by the disposition of the appellate courts to reverse these verdicts. The higher up an employee claim for damages goes in the judicial hierarchy, the more sacred become property rights and the less the value attached to human rights. The employee hardly ever won.
>
> A compensation law would level off some of the big judgments. There is no doubt about that. But it would also remove the gamble railroad employees must now take in securing a big judgment or none at all. Instead of the long chance of winning a jackpot with the dice loaded against them, compensation for injuries and death would be reasonably certain under a Federal compensation law.

On August 11, 1939 the President signed into law S. 1708 (76th Congress, First Session), amending the FELA, *viz.*:[71]

1. The provisions of the Act were extended to employees of carriers "any part of whose duties as such employees shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce."

2. Employees are not to be held to have assumed the risks of their employment where injury or death results in whole or in part from the negligence of the carrier.

3. Actions under the act are required to be commenced within three years from the day the cause of action occurred.

[70] 38 THE RAILWAY CLERK 329 (1939).
[71] 53 STAT. 1404 (1939), 45 U. S. C. §§51-60 (1946).

4. Any contract, rule, regulation or device whatsoever, the purpose, intent, or effect of which is to prevent employees of common carriers from furnishing voluntary information to a person in interest as to the facts incident to the injury or death of any employees, is declared void, and carriers are prohibited from disciplining employees who furnish such information.

Prior to the amendment of August 11, 1939, in order that there might be recovery under the FELA the injured or deceased employee must have been engaged in an "act of interstate transportation" at the time the accident occurred. It will readily be observed that the scope of the act was much broadened by the 1939 amendment. However, at least the Brotherhood of Locomotive Firemen and Enginemen was not satisfied with the amended law. The president of that organization, on July 7, 1941, said:[72]

> The Employers' Liability Act for the past twenty years has gradually been taking on new form, and if you asked a damage-suit lawyer what the act meant he would tell you that it means just what the courts say it means. You could no longer read the act and understand just what your rights were.

In 1944, the United States Employees' Compensation Commission appealed to Congress for a compensation law covering interstate employees.[73]

On June 1, 1940, July 19, 1941, August 7, 1941 and September 6, 1941, drafts of a proposed Interstate Workmen's Compensation Act were released by the Railroad Retirement Board, or as confidential committee prints of the Senate Committee on Interstate Commerce. No action was taken on any of these, because of the fact that the emphasis was shifted, resulting in extensive amendment of the Railroad Retirement Act and the Railroad Unemployment Insurance Act by Public Law 572 (79th Congress, 2d Session), which became effective, generally speaking, on July 31, 1946.[74] These drafts presumably give a reasonably clear preview of what might be expected in any federal workmen's compensation law, except that it is not possible, of course, to forecast how greatly these provisions will be "liberalized."

Section 20 of the Merchant Marine Act of 1915[75] as amended by the Jones Act of 1920[76] makes the provisions of the FELA available to seamen as an optional rem-

[72] 111 BROTHERHOOD OF LOCOMOTIVE FIREMAN AND ENGINEMAN'S MAGAZINE 98 (1941).

[73] TWENTY-EIGHTH ANNUAL REPORT OF THE U. S. EMPLOYEES' COMPENSATION COMMISSION 4 (1944).

[74] The Railroad Social Insurance Bill was introduced in the House on May 15, 1944, by Representative Crosser as H. R. 4805 (78th Cong., 2d Sess. (1944); 90 CONG. REC. 4525 (1944)), and in the Senate on May 11, 1944, by Senators Wagner and Wheeler as S. 1911 (78th Cong., 2d Sess. (1944); 90 CONG. REC. 4295 (1944)). Both bills, however, omitted Title III of the Committee Print which was the title covering workmen's compensation. Later in the Session, Representative Crosser substituted H. R. 5625 for H. R. 4805 (78th Cong., 2d Sess. (1944); 90 CONG. REC. 9624 (1944)), but neither the House nor the Senate enacted this legislation during the Seventy-eighth Congress. The bills were again introduced in the Seventy-ninth Congress, and again without the compensation features, as H. R. 1362 (79th Cong., 1st Sess. (1944); 91 CONG. REC. 229 (1944)) in the House and S. 293 (79th Cong., 1st Sess. (1944); 91 CONG. REC. 231 (1944)) in the Senate. H. R. 1362, as amended, was passed by both Houses and approved by the President on July 31, 1946, but without the workmen's compensation provisions (79th Cong., 2d Sess. (1946); 92 CONG. REC. 10172, 10317-10322, 10636 (1946); 60 STAT. 722 (1946), 45 U. S. C. §§228A-K, 351-363A (1946)).

[75] 38 STAT. 1185 (1915), 46 U. S. C. §688 (1946).

[76] 41 STAT. 998, 1007, 46 U. S. C. §688 *et seq.* (1946).

edy against negligent ship owners. Seamen have long opposed workmen's compensation laws, so that it is likely that they would oppose the substitution of a federal workmen's compensation law for the FELA.

The American Bar Association proposes that the FELA shall not apply with respect to injuries suffered, or death resulting therefrom when occurring in any state, territory, or the District of Columbia, having a workmen's compensation act applicable to such injury or death. At the seventy-second annual meeting of the American Bar Association, in St. Louis, Missouri, September 5-9, 1949, a resolution to that effect was adopted by the House of Delegates.[77] As yet, no bill has been introduced in Congress to this effect. What position the interested parties will take in the event such a bill is introduced in Congress remains to be seen.

Each of the forty-eight states now has a workmen's compensation law. The extent to which railroads and their employees are subject to these laws is not susceptible of exact determination. The legislatures of forty-four states met during the year 1949 and enacted measures to "improve" their workmen's compensation laws. Most of them liberalized the benefits, and, in many instances, the benefits were increased substantially. During that year the benefits under the Federal Employee's Compensation Act were also liberalized. In addition to the liberalization of benefits, the state legislation for 1949 was outstanding for the trend toward full coverage of occupational diseases instead of schedule coverage. For instance, South Carolina enacted occupational disease coverage for the first time and adopted the all-inclusive type of law. Now, more than half of the forty states with occupational disease provisions have full coverage. Other amendments in 1949 included extension of coverage, reduction of waiting period, more liberal benefits, increased allowances for burial expenses, second-injury fund and vocational rehabilitation provisions, not to mention procedural changes.[78]

Some of the states have "elective" laws, under which employers may refuse to operate under the compensation act if they prefer to risk an injured worker's suit for damages. So far as can be ascertained, twenty-six states have elective laws and twenty-two have compulsory statutes which require every employer within the scope of the compensation act to accept that act and pay the compensation specified.

In eleven states[79] the compensation laws apply mainly to listed "hazardous" or "extra-hazardous" employments. Illustrative of the complications which arise in endeavoring to interpret or apply compensation laws is the provision of the Maryland law[80] which lists "extra hazardous" employments that are covered and then, in addition, provides that the act shall apply "to all extra-hazardous employments not specifically enumerated and to all work of an extra-hazardous nature." This

[77] 74 A. B. A. REP. 108-109 (1949).

[78] *Workmen's Compensation Legislation in 1949*, 69 MONTHLY LAB. REV. 514 (Nov. 1949).

[79] Illinois, Kansas, Louisiana, Maryland, Montana, New Mexico, New York, Oklahoma, Oregon, Washington, and Wyoming.

[80] MD. CODE ANN., Vol. 2, Art. 101, §§14, 45, 67 (1939).

illustrates that some of the state workmen's compensation laws are no more "certain" than is the FELA.

The power of a state to enact workmen's compensation laws, including the power to do away with the fellow servant rule and the assumption of risk doctrine as to employees engaged at the time of the accident in a service not coming within the provisions of the FELA, was sustained in *Boston & Maine R. R. v. Armburg*,[81] based upon many previous decisions of the Supreme Court of the United States.

It would seem to be possible, constitutionally, to repeal the FELA and to substitute therefor a federal workmen's compensation act, or alternatively, to make the provisions of the state workmen's compensation laws applicable to railroad employee injuries, if either would be desirable. This was considered constitutionally possible even before the *Alton* case was decided.[82] It would also seem to be possible, constitutionally, to broaden the provisions of the Longshoremen's and Harbor Workers' Compensation Act, so as to make that law applicable to railroad employees.[83]

The Supreme Court of the United States is now much more "liberal" than when the *Alton* case was decided, so that constitutional impediments have very largely evanesced. The constitutional problems having vanished, the real issues are whether or not such legislation is desirable and whether it is possible to obtain it in view of the positions maintained by some of the organizations of employees.

[81] 285 U. S. 234 (1932).

[82] Albertsworth and Cilella, *A Proposed "New Deal" for Interstate Railway Industrial Harms*, 28 ILL. L. REV. 587, 774, 785-786 (1934).

[83] See Andrews, *Complete the Circle of Compensation*, 15 AM. LAB. LEG. REV. 285-288 (1925).

FELA OR UNIFORM COMPENSATION FOR ALL WORKERS?*

REGINALD PARKER†

The Federal Employers' Liability Act,[1] despite its title, is an act regulating the work-injury liability, not of employers in general, but merely of railroads. The predecessor of the present statute was similarly limited to railroad employees.[2] However, a Supreme Court then anxiously guarding a narrow interpretation of the Constitution's commerce clause declared the Act unconstitutional as not expressly confined to the regulation of interstate commerce.[3] The 1908 Act therefore made it clear that the law was to apply only to carriers "by railroad while engaging in commerce between any of the several states. . . ."[4] The 1939 amendment extended the coverage to railroad employees any part of whose duties is the "furtherance" of or "in any way directly or closely and substantially affect" interstate commerce.[5] Despite this broadening of scope, the FELA is still confined to railroad employees.[6]

And even within this limit, the Act[7] is not a railroad workers' compensation statute, such as the Longshoremen's and Harbor Workers' Compensation Act[8] or the Federal Employees' Compensation Act.[9] Rather, it is a statute modifying the duties under tort law of railroads toward their employees. Under the common law of torts, the master is liable to his servants for negligence, particularly in providing them with a safe place to work as well as with safe tools,[10] and has a duty to help them when in peril.[11] These duties, however, are or at least were[12] subject to con-

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[1] 35 STAT. 65 (1908), as amended, 36 STAT. 291 (1910), 53 STAT. 1404 (1939), 45 U. S. C. §§51-60 (1946).

[2] 34 STAT. 232 (1906).

[3] Howard v. Illinois Central R. R., 207 U. S. 463 (1908). See Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV. 138, 146 (1944).

[4] 35 STAT. 65 (1908).

[5] 53 STAT. 1404 (1939), 45 U. S. C. §51 (1946).

[6] See *infra*, note 22.

[7] The title of the FELA is misleading. It is not a "federal employer" law (*cf. infra*, note 9) but a (federal) law pertaining to employers; and it does not pertain to "employers" as such, either, because it merely applies to railroads.

[8] 44 STAT. 1424 (1927), 33 U. S. C. §901 (1946).

[9] 39 STAT. 742 (1916), as amended, 5 U. S. C. §751 (1946).

[10] See PROSSER ON TORTS 506-509 (1941).

[11] *Id.* at 193.

[12] Modern workmen's compensation laws and a more favorable attitude toward labor have no doubt made important inroads on the employer-minded common law. *See, e.g.*, Baumgartner v. Holslin, 52 N. W. 2d 763 (Minn. 1952) (farm worker, though experienced, recovers in tort for injury from

siderable restrictions, which made the lot of the worker in common-law countries somewhat less desirable than that of his brethren under the civil law. His negligence suit against the employer is or was open to the defense of his contributory negligence, which was not hard to adduce; after all, it can nearly always be said that with greater care the employee could have avoided an accident that occurred under circumstances over which he was likely to have greater control than his master. And if he was not contributorily negligent, the easily proved fact that he had "assumed" the risks of his employment stood up as another defense against his claim. Furthermore, even if the servant had neither carelessly contributed to nor assumed the dangers that brought about his accident, the fault of a fellow servant could be used under a particularly harsh doctrine in order to defeat the tort action. Lastly, it was and still is one of the most confusing vestiges of our tort law that the "mere" violation of a statutory duty, such as perchance a law prescribing safety measures, is not in itself proof of negligence.[13]

The FELA, as amended, has done away with the defense of contributory negligence as we know it and replaced it by comparative negligence of maritime and European civil law, which works merely in mitigation of damages. It has completely abolished the fellow servant doctrine, which means that respondeat superior is applicable and the railroad is liable regardless of who within the scope of his railroad employment caused the accident. Assumption of risk is no longer a defense, not even in mitigation of damages, which, oddly enough, means that when the injured railroad man could merely foresee the danger but negligently disregarded it, he loses some of his claim under the comparative negligence doctrine; but if he knew of the danger and willfully assumed it, he recovers fully.[14]

Finally, the Safety Appliance Acts[15] as interpreted by the courts have established the rule that any violation of these acts, or of any regulation issued thereunder, imposes absolute liability on the railroad. The problem of negligence may not be raised and it is error to charge the jury with the question in safety appliance cases.[16] The scope of this rule is very far-reaching and at times brings the FELA into the close vicinity of an insurance law or, in other words, of workmen's compensation. Once the failure to work properly of a safety appliance (such as power driving-wheel brakes, automatic couplers, grab irons, bell ringers, boilers, or sanding apparatus) is shown, there remains only the question of causation. It makes no difference why the ap-

poison gas emerging from feed silo); Heinlen v. Martin Miller Orchards, 242 P. 2d 1054 (Wash. 1952) (orchard worker recovers for injury inflicted by brush-shredding machine whose defectiveness he knew though not the risk of harm resulting therefrom). And see Jenkins v. Banks, 87 A. 2d 908 (Me. 1952) (duty to furnish safe tools, if any, exists even toward contractor); Enid Transfer & Storage Co. v. Mollenhauer, 251 P. 2d 1068 (Okla., 1952); Leflar, *Negligence in Name Only*, 27 N. Y. U. L. REV. 564, 576 (1952).

[13] See the discussion in PROSSER ON TORTS 264-276 (1941).

[14] *See* Byler v. Wabash R. R., 196 F. 2d 9 (8th Cir. 1952) (contractual risk-assumption no defense); Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV. 138, 150-51 (1944).

[15] 27 STAT. 531 (1893), as amended, 45 U. S. C. §§1-46 (1946).

[16] O'Donnell v. Elgin, Joliet & Eastern Ry., 338 U. S. 384 (1949); Lilly v. Grand Trunk Western R. R., 317 U. S. 481 (1943).

pliance failed to work; nor may the railroad be allowed to prove that it exercised due diligence in taking care of it.[17] And as to causation, a so-called "contributory proximate"[18] cause is all that need be shown. Thus an engineer was killed by another train when he got out of his engine to attempt to make the sanding apparatus work. The failure of the sander was held to be the cause of his death, and the arguments of remoteness and indirectness were rejected.[19]

This mode of legislation has created a friendly atmosphere toward injured railroad workers in the courts, both state and federal.[20] The sufficiency of the evidence is a federal question to be determined by the holdings of federal decisions.[21] Verdicts are high, probably higher than they would be in ordinary tort suits for similar injuries. And it need not be emphasized that, stripped of their most powerful common-law defenses, particularly contributory negligence and assumption of risk, the defendant railroads under the FELA have less of a chance to prevail than ordinary defendants in negligence suits. In spite of all this, however, the narrowness of the scope of the FELA must not be overlooked. The Act does not apply to some workers engaged in quite similar tasks and subject to the same perils as railroad employees, such as Pullman car porters or railway express employees.[22] It does not apply[23] where the worker received a work injury through a third party's fault and it has been held that this excludes from the applicability of the Act even suits against third-party railroads, *i.e.*, railroads other than the one employing the injured worker.[24] It is, however, not necessary here to explore the size and limits of the exceptions, as well as of the exceptions to the exceptions, because, as we shall try to demonstrate, the special status of the railroader appears to be an outmoded conception of the law.

American workers, apart from railroad employees, fall into several groups as far as their rights to recover for work injuries are concerned. Domestic servants

[17] See Forer and Richter, *The Federal Employers' Liability Act*, 12 F. R. D. 13, 45 (1952).

[18] Coray v. Southern Pac. Co., 335 U. S. 520, 523 (1949); Eglsaer v. Scandrett, 151 F. 2d 562 (7th Cir. 1945); Givens v. Missouri, K. & T. R. R., 195 F. 2d 225, 229-30 (5th Cir., 1952).

[19] Warning v. Thompson, 249 S. W. 2d 335, 339 (Mo. 1952); Anderson v. Baltimore & O. R. R., 96 F. 2d 706 (2d Cir. 1938).

[20] An FELA action may be brought in either the state or the federal courts regardless of the parties' citizenship or the amount involved, but if brought in a state court it may not be removed to a federal court. 36 STAT. 291 (1910), as amended, 62 STAT. 989 (1948), 45 U. S. C. §56 (1946). And see 28 U. S. C. §1445. For a good survey of some of the problems involved, see Note, *Federal Employers' Liability Act in Inconvenient State Courts*, 5 U. OF FLA. L. REV. 72 (1952). And see Missouri *ex rel.* So. Ry. v. Mayfield, 340 U. S. 1 (1950), 6 NACCA L. J. 168, 30 N. C. L. REV. 168 (1952), for a discussion of a state's power to deny access to its courts in FELA suits.

[21] Jesionowski v. Boston & Maine R. R., 329 U. S. 452 (1947); Brady v. Southern Ry., 320 U. S. 476 (1943); Propper v. Chicago, R. I. & P. R. R., 54 N. W. 2d 840 (Minn. 1952). And see Note, *The Directed Verdict and Applicability of State Procedural Rules in FELA Cases*, 27 IND. L. J. 536 (1952).

[22] Wells, Fargo & Co. v. Taylor, 254 U. S. 175 (1920) (express messenger); Robinson v. Baltimore & O. R. R., 237 U. S. 84 (1915) (Pullman porter, even though collecting tickets).

[23] *I.e.*, the plaintiff is confined to the common-law remedies and subjected to its defenses.

[24] Patton v. Baltimore & O. R. R., 197 F. 2d 732 (3d Cir. 1952); Hartley v. Baltimore & O. R. R., 194 F. 2d 560 (3d Cir. 1952); Risberg v. Duluth, M. & I. Ry., 233 Minn. 396, 47 N. E. 2d 113 (1951), *cert. denied*, 342 U. S. 832 (1951). The FELA does apply, on the other hand, to clerical personnel. Lillie v. Thompson, 332 U. S. 459 (1947).

and unfortunately farm workers[25] are usually confined to the common law of torts with its defenses—still valid to a varying degree—of contributory negligence, assumption of risk, and the fellow servant doctrine; and the same is true of those other workers whom the various state laws have chosen to exclude from workmen's compensation.[26] Maritime workers other than longshoremen and harbor workers have a variety of rights in case of injury. One of them, the right to maintenance and cure, approximates workmen's compensation and, indeed, health insurance.[27] The other seamen's rights are closely akin to those accruing to railroad men under the FELA,[28] yet they do go beyond the latter in that the boat owner's liability for "unseaworthiness" of the vessel creates an absolute liability not only for specific appliances (as for railroads under the Safety Appliance Acts) but also for anything that is a part of the boat[29]—under a recent decision even the vicious propensities of a fellow crew member.[30] In view of these three factors—negligence liability of the boat owner to the exclusion of the common-law defenses; absolute liability for any unseaworthiness; and liability for maintenance and cure in cases not necessarily involving accidents at all—it may be said that seamen have the most far-reaching rights.

Longshoremen and harbor workers are covered by a federal workmen's compensation act,[31] as are employees of the Federal Government.[32] Aside, then, from railroad men and from statutory exceptions such as for farming or domestic work, all other American workers are protected as well curtailed by state workmen's compensation laws. This is so regardless of whether or not the worker is engaged in or furthers interstate commerce.

It is frequently heard that the social protection afforded by state workmen's compensation is inadequate.[33] The maximum awards for permanent disabilities, total or partial, are pitifully low in many states both as to the limit of weekly pay-

[25] The idea that agricultural or horticultural work is not dangerous is actually a myth. Of the 16,500 fatal work accidents in the United States, in 1948, 4,400, or 26.6 per cent, occurred in farming, which in absolute number of industrial deaths leads all other occupations. The death rate has been steadily falling in other industries, but in farming it has risen and was higher in 1948 than in 1945. Powers, *Farm Injuries*, 243 NEW ENGLAND JOURNAL OF MEDICINE 979 (1950).

[26] See the survey in U. S. BUREAU OF LABOR STANDARDS BULL. NO. 125, STATE WORKMEN'S COMPENSATION LAWS 4-6 (1950 with 1952 supplements); 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION 734-816 (1952).

[27] *Cf.* Howe, *Rights of Maritime Workers*, 6 NACCA L. J. 131, 133-135 (1950); Comment, *Admiralty—Maintenance and Cure*, 50 MICH. L. REV. 435 (1952).

[28] These are incorporated into the Jones Act. 41 STAT. 1007 (1920), 46 U. S. C. §688 (1946); Correia v. Van Camp Sea Food Co., 248 P. 2d 81 (Cal. App. 1952); Howe, *Rights of Maritime Workers*, 5 NACCA L. J. 146, 156-58 (1950).

[29] *E.g.*, a plank used as a walkway between locomotives on board ship. Brabazon v. Belships Co., 103 F. Supp. 592 (E. D. Pa. 1952); Howe, *Rights of Maritime Workers*, 6 NACCA L. J. 131, 135 (1950).

[30] Keen v. Overseas Tankship Corp., 194 F. 2d 515 (2d Cir. 1952), 100 U. OF PA. L. REV. 1045 (1952).

[31] *Supra*, note 8. Section 3 of the Longshoremen's Act provides that the Act shall apply only "if recovery for the disability or death through Workmen's Compensation proceedings may not validly be provided by state law." See Western Boat Building Co. v. O'Leary, 198 F.2d 409 (9th Cir. 1952).

[32] *Supra*, note 9.

[33] For a diacritical analysis, see ARTHUR H. REEDE, ADEQUACY OF WORKMEN'S COMPENSATION (1947). For an outright condemnation see the CIO pamphlet, *Workmen's Compensation—A Story of Failure*, Economic Outlook, Jan. 1952, and the AF of L periodical, The Weekly Dispatch (San Antonio), Nov. 14, 1952, page 2.

ments and the total maximum benefit a crippled worker may receive. The number of weeks for which payments may be made is arbitrarily and unjustifiably limited. The maximum allowable burial expenses in many states could in these inflation-ridden days cover hardly more than the funeral bill of a pet cemetery. And death benefits are far below any recognized standard of adequacy.[34]

A learned reviewer of my textbook on administrative law has emphasized my friendly disposition toward administrative law.[35] Yet my faith in agencies has received a blow—albeit not a knockout—upon perusing a recent study that tends to show that workmen's compensation procedure, which is usually[36] conducted before administrative agencies, is at least not inherently more expeditious or economical than the judicial procedure involved in law suits under the FELA.[37] On the other hand, even assuming the general validity of the Illinois study, it has also been demonstrated by competent authority[38] that tort suits under the FELA amount to a lottery in that the plaintiff can never be sure whether or not he can prove his case, *i.e.*, his employer's negligence. In other words, the injured railroad man gets either more than (at times, at least as much as) his fellow worker under workmen's compensation, or nothing at all.[39]

It is, however, not within the purview of this paper to explore and evaluate with apodictic finality the relative merits of either system. For to decide whether certain law is "good" or "bad" is essentially a political task. "Good" law, correctly speaking, is law that is deemed more socially desirable from the speaker's subjective point of view. In other words, it depends on his social, economic and maybe moral *Weltanschauung*.[40]

[34] For a comprehensive survey, see U. S. BUREAU OF LABOR STANDARDS BULL. No. 125, *op. cit. supra* note 26.

[35] Madden, Book Review, 5 VAND. L. REV. 680 (1952).

[36] In five states workmen's compensation claims are administered by the judiciary. U. S. BUREAU OF LABOR STANDARDS BULL. No. 125, *op. cit. supra* note 26, at 42.

[37] ALFRED F. CONARD AND ROBERT I. MEHR, COSTS OF ADMINISTERING REPARATION FOR WORK INJURIES IN ILLINOIS (GRADUATE COLLEGE, UNIVERSITY OF ILLINOIS, 1952). See also, Conard, *Workmen's Compensation: Is It More Efficient Than Employers' Liability?*, 38 A. B. A. J. 1011 (1952). And see Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L. Q. 203 (1951). But see Bancroft, *Some Procedural Aspects of the California Workmen's Compensation Law*, 40 CALIF. L. REV. 378 (1952), reaching about the opposite result at least as far as California is concerned. See also Dodd, *Administration of Workmen's Compensation*, 20 MISS. L. J. 168, 171 (1949).

[38] Pollack, *Labor Looks at Workmen's Compensation*, in WORKMEN'S COMPENSATION PROBLEMS, U. S. BUREAU OF LABOR STANDARDS BULL. No. 156 141 (1952); Pollack, *Workmen's Compensation for Railroad Work Injuries and Diseases*, 36 CORNELL L. Q. 236 (1951) (Mr. Jerome Pollack is Consultant for the UAW-CIO). And see 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION 438-440 (1952).

[39] For recent examples chosen at random, where recovery was denied for railroaders' work injuries or deaths, see Moore v. Chesapeake & O. R. R., 340 U. S. 573 (1951) (recovery for death denied for want of employer's negligence); Chesapeake & O. R. R. v. Thomas, 198 F. 2d 783 (4th Cir. 1952) (same); Lamancusa v. Pennsylvania R. R., 104 F. Supp. 833 (E. D. Pa. 1952) (pneumoconiosis); Williams v. Thompson, 251 S. W. 2d 89 (Mo. 1952) (injury); Atlantic Coast Line R. R. v. Clarke, 59 So. 2d 778 (Fla. 1952) (injury); Ellis v. Louisville & N. R. R., 251 S. W. 2d 577 (Ky. 1952) (silicosis action for $99,800).

[40] Kelsen, *Science and Politics*, 45 AM. POL. SCI. REV. 641 (1951); KELSEN, GENERAL THEORY OF LAW AND STATE 5 (1945). For a learned critique, see Olstad, *The Descriptive Definition of the Concept "Legal Norm" Proposed by Hans Kelsen*, 16 THEORIA, A SWEDISH J. OF PHILOS. AND PSY. 118 (1950).

Yet some objective evaluation seems still permissible. If law is a social technique, then "bad" law is necessarily such law as will fail to accomplish the—at times objectively ascertainable—goal of the lawmaker. Professor Beutel not long ago ably demonstrated that observation and experimentation may reach objectively tenable results in regard to the question of whether or not a particular law accomplishes what its makers obviously want and, if not, whether a different law would be an improvement.[41] The factual study by Conard and Mehr,[42] if sound (a question that I must leave to competent insurance economists), is of course a very obviously apposite example for experimental and applied jurisprudence in our field of workmen's compensation and railroad tort law.

At times the task of probing into law objectively rather than from a political or policy point of view can be done from the four corners of the law alone, so to speak.[43] At other times the entire system of related law must be considered in order to evaluate objectively whether a given body of law, from an efficiency point of view, has its justifiable and deserved place in the legal order. Such a law of the latter category is the FELA, which can be said to be obsolescent—or "bad" if the value judgment must be made—if considered as a whole, *i.e.*, against the background of present constitutional law and in comparison with similar law pertaining to other occupational groups. Briefly, there appears to be no longer any good reason for singling out railroad workers and placing them in a special (privileged or underprivileged, depending on the side of the controversy we are on) group.

The validity of the FELA is grounded in the interstate commerce clause of the Constitution. However, as everybody knows, this clause is not what it used to be in 1906 or 1908. Indeed, it might be argued that, aside from the Thirteenth and Fourteenth Amendments, the Constitution has never been more sweepingly amended than by the judicial decisions interpreting "interstate commerce" in those years, 1937-1941, that were so decisive in shaping our system of government and control as we now know it.[44] Turning to the phases only that are of relevance for this study, we find that in 1908 railroads, indeed, were considered as being engaged in interstate commerce,[45] but without gross exaggeration we might say there was little else then so regarded.[46] In our time, however, it is settled that, contrary to former views, the "manufacturer of goods" may be regarded as commerce,[47] as may be oil drilling,[48] insurance,[49] or even the transportation by an oil company of its own oil

[41] Beutel, *Relationship of Natural Law to Experimental Jurisprudence*, 13 OHIO. ST. L. J. 167 (1952).

[42] *Op. cit. supra*, note 37.

[43] Some time ago I attempted to show the Federal Administrative Procedure Act's innate deficiencies (aside from the political question of the desirability of its provisions) and hence its lack of efficiency in several of its aspects. Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L. J. 582 (1951); PARKER, ADMINISTRATIVE LAW 60-82 (1952).

[44] For a most dramatic and yet scholarly account of those years see Stern, *The Commerce Clause and the National Economy 1933-46*, 59 HARV. L. REV. 645 (1946).

[45] The validity of the Longshoremen's Act is of course grounded on the federal admiralty jurisdiction.

[46] The standard text on constitutional law was a treatise on its limitations. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (8th ed. Carrington, 1927). And see CORWIN, COURT OVER CONSTITUTION (1938).

[47] Jones & Laughlin, *infra*, note 51.

[48] Warren-Bradshaw Drilling Co. v. Hall, 317 U. S. 88 (1942).

[49] United States v. South-Eastern Underwriters' Ass'n, 322 U. S. 533 (1944).

through its own pipelines to its own station.[50] And we find that labor relations as well as the very employment contract itself may be federally regulated[51] in industries and enterprises not necessarily engaged in but perhaps merely affecting interstate commerce. Thus the labor relations of a landlord with his janitor in a building whose tenants were engaged in interstate commerce were found to be subject to federal regulations[52] as were those of a contractor and his workers in a case where the contractee-principal was doing commerce-affecting work.[53] And the NLRA was declared applicable to the workers of a local streetcar line.[54] In short, there is probably no field of which it may be safely said that Congress could not exercise jurisdiction, and the commerce clause is now recognized as enabling Congress "to allow interstate commerce to take place on whatever terms it may consider in the interest of the national well-being."[55] Nor is it likely that this trend has come to a standstill. A New Deal Congress made the Wagner Act; yet a Republican Congress, under the sponsorship of Senator Taft and Congressman Hartley, enlarged its scope considerably. Different political parties may change the contents of federal laws, but they will not diminish, I am sure, federal power over a given field once it has been occupied.

The constitutional situation of 1908 is, incidentally, not the sole reason why the FELA, despite its sweeping title, was confined to railroad employees. Mining and other dangerous occupations were not interstate commerce in 1908; but some other activities, such as airplane piloting or bus driving, would no doubt have then been regarded as being in the same constitutional category as railroading, had they existed. Time and technical progress have marched on, but not the law. In 1952 it must strike us as highly anomalous to see railroad men, but not airline or interstate bus line employees (or, pursuant to narrow judicial interpretation of the FELA, sleeping car porters[56] and railway express employees[57]) placed under a special law in regard to their work injuries. This state of affairs is not in accord with the customary pattern of modern justice which attempts to treat like situations equally.

Of course, inequality need not per se be regarded as "unjust" as long as it has a justifiable[58] basis. If in medieval law the serf was treated differently from the baron, that was in accordance with the concept of justice, at least of the ruling classes. We do not object to a Wage and Hour Law that exempts from its protective provisions executive and professional as well as a great many other employees

[50] Champlin Refining Co. v. United States, 329 U. S. 29 (1946).

[51] National Labor Relations Board v. Jones & Laughlin, 301 U. S. 1 (1937) (NLRA constitutional); United States v. Darby Lumber Co., 312 U. S. 100 (1941) (FLSA constitutional). And see Stern, *supra*, note 44.

[52] A. B. Kirschbaum Co. v. Walling, 316 U. S. 517 (1942).

[53] Warren-Bradshaw, *supra*, note 48; Walling v. McCrady Construction Co., 156 F. 2d 932 (3d Cir. 1946).

[54] National Labor Relations Board v. Baltimore Transit Co., 140 F. 2d 51 (4th Cir. 1944), *cert. denied*, 321 U. S. 795 (1944).

[55] Stern, *supra*, note 44, at 946.

[56] *Supra*, note 22.

[57] *Ibid.*

[58] I will certainly not be suspected of being a natural lawyer. See Parker, *Natural Law and Kelsenism*, 13 Ohio. St. L. J. 160 (1952).

for ascertainable reasons that were convincing at any rate to the lawmakers. Likewise may we justify the regionally different treatment of otherwise alike events. If, under state workmen's compensation laws, life is worth at most a mere $6,600 in Virginia whereas in Oklahoma it is valued up to $13,500, this is justifiable—and hence "just" if the term is desired—to any believer in a federal system of government: even as the laws of divorce or the penalties for homicide may differ from state to state, there may be different compensation benefits for life and limb in the several states. And a federal workmen's injury law confined to railroad employees was perhaps justifiable in 1908 under the Constitution as we then had it. It is no longer justifiable today.

To leave injured railway workers to state workmen's compensation would create constitutional, though not regional, uniformity. It was not possible in 1906 and 1908 when but few states had workmen's compensation laws,[59] whose constitutional validity was considered dubious.[60] It might be quite feasible today. Yet, to turn the clock back and give railroaders to the states would meet strong opposition in all quarters concerned,[61] in view of both the low compensation awards prevailing in nearly all the states and the endless interstate jurisdictional disputes this solution would no doubt create.[62]

The only road toward justice—*i.e.,* the elimination of unjustifiable distinctions between worker and worker—appears to be leading not away from federal law but rather toward a general federal workmen's compensation law.[63] The Federal Government has occupied the field of wages, hours, child labor, and labor relations.[64] There can be no doubt that a Federal Workers' Injury Law would be upheld as constitutional. Such a statute, to be sure, would not eliminate all apparent inequality. Being confined by the limits of the interstate commerce clause, however liberally construed, the federal law could probably not cover enterprises of the most local character. In other words, as we pointed out before, in as much as we have a federal form of government, there will be inequalities created—and justifiable—by the very fact of federalism. Moreover, the law might choose, as the Wage and Hour Law does, to except categories of employers on such grounds as comparative

[59] See 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION 36-39 (1952); SAMUEL B. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 6-10 (1944).

[60] *Cf.* Ives v. South Buffalo Ry., 201 N. Y. 271, 94 N. E. 431 (1911), holding the first New York workmen's compensation law unconstitutional.

[61] See American Bar Association resolution, 74 A. B. A. REP. 108 (1949) (favoring federal workmen's compensation for railroad workers and seamen); Pollack, *Workmen's Compensation for Work Injuries and Diseases,* 36 CORNELL L. Q. 236, 264 (1951) (same); Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers,* 36 CORNELL L. Q. 203 (1951) (favoring retention of FELA); Horovitz, *The American Bar Association Resolution to Abolish the FELA and the Jones Act,* 5 NACCA L. J. 11 (1950) (same). And see 2 LARSON, *op. cit. supra* note 26 at 438-444.

[62] Quite aside from the evidently undesirable solution of letting a railroad man's compensation depend on the law of the state in which the injury occurred, many instances of work injuries, notably occupational diseases, would defy any attempt to be geographically imputed to a given area.

[63] It may be apposite to remember that our last great Republican president, Theodore Roosevelt, raised just that postulate—to enact a general federal workmen's compensation law. 42 CONG. REC. 73 (1907).

[64] *Supra,* note 51.

unimportance or low accident rates, and the law might exempt from its provisions all non-hazardous occupations.[65] All these and other resultant inequalities could be justified in some objective, tenable fashion. The new Congress may carefully weigh and choose among professions and groups of industrial hazards and select those best suited for nation-wide uniformity, that is, for federal law. But to continue the singling out of railroad men for federal treatment, because that was as far as we could get in 1908, is the perpetuation of an archaic piece of legislation.[66]

It is obvious that a modern workers' injury act must be a true work-injury law, where the claim for recovery arises if the injury was connected with the employment.[67] The FELA's still prevailing recovery-for-negligence pattern, however much whittled down by legislative amendment and judicial interpretation, is not likely to be imitated again. Even if under liberal construction some railroad employees at times recover for acts or omissions that would not be regarded as giving rise to a cause of ordinary negligence action, the fact still remains that others cannot recover for their work injuries for want of a showing of negligence.[68] In other words, if we agree with the words of Theodore Roosevelt that to put the burden of loss of life or limb on the victim or his family is a form of *social injustice*,[69] only a law in the nature of workmen's compensation can be the remedy. Negligence suits with doubtful outcome do not eliminate "social injustice." As we support, by social security, the aged worker, thus must we take care of the one who is crippled.

Court or board—that is the often ventilated question.[70] Until the elaborate Illinois study by Conard and Mehr,[71] the probably prevailing opinion regarded court procedures as cumbersome, slow, and more expensive than industrial accident boards. The Illinois research study, however, tends to show the opposite—that, at least in that state, court procedures under the present FELA are cheaper, not essentially slower, and financially more beneficial to the injured worker than administrative procedures under the state workmen's compensation law. A recent, well-documented California study,[72] on the other hand, demonstrates that—at least

[65] This, at least, is a frequent pattern of exclusion from workmen's compensation coverage. U. S. BUREAU OF LABOR STANDARDS BULL. No. 125, *op. cit. supra*, note 26, at 4-6. I have often doubted the justification of this exemption. If an occupation is non-hazardous, the compensation insurance premium will be lower; but, as far as the individual goes, his work injury is none the easier to bear because the probability ratio of its occurrence was lower!

[66] See PROSSER ON TORTS 547-8 (1941). And see the criticism by Mr. Justice Frankfurter, concurring in Wilkerson v. McCarthy, 336 U. S. 53, at 64 (1949); concurring in Urie v. Thompson, 337 U. S. 163, at 196 (1949); Jaffe, book review, 4 J. LEGAL EDUC. 472 (1952).

[67] Whether the standard workmen's compensation law phrase "arising out of and in the course of the employment" constitutes as desirable a delineation of work injuries as its originators in imitation of the English law seem to have thought, is open to doubt. *See* Cardillo v. Liberty Mutual Ins. Co. 330 U. S. 469, 479 (1947); Horovitz, *The Litigious Phrase: "Arising out of" Employment*, 3 NACCA L. J. 15 (1949); Bear, *Survey of the Legal Profession—Workmen's Compensation and the Lawyer*, 51 COL. L. REV. 965, 968 (1951).

[68] See the cases *supra*, note 39. And see Pollack, *supra*, note 38; Miller, *supra*, note 14.

[69] *Supra*, note 63.

[70] For authorities on both sides of the controversy see the literature cited *supra*, note 61.

[71] *Supra*, note 37. See, however, Conard, *Workmen's Compensation: Is It More Efficient Than Employer's Liability?*, 38 A. B. A. J. 1011, 1058 (1952) ("The Illinois study does not show that federal employers' liability is a better system than workmen's compensation.")

[72] Bancroft, *supra*, note 37.

in California—"the compensation system is remarkable for its efficiency and speed"; that hearings on the average consume but one hour; that more than 50 per cent of the claims are generally decided administratively within three months after filing; and, last but not at all least, that the average attorney's fee awarded by the Commission is no more than $100.10. At any rate, there can be no doubt that boards are better adapted for "streamlining," such as through the introduction of the referee system, than the courts.

Be this as it may, if the proposed injured workers' law is to operate regardless of negligence, it is not likely that its administration will be left to the already overburdened courts, federal or state. The parties' legitimate desire to have a jury trial in tort cases centers around two phases of the litigation: the negligence issue and the amount of damages.[73] The former would be immaterial, and the latter determined by compensation rates whose adequacy must be up to the people, *i.e.*, to Congress. In other words, the work-injury law applying to all, or most, or at least many, interstate-commerce-affecting workers must be a piece of social legislation whose benefits accrue independent of fault or defective appliances and whose awards are uniform as to similar situations.[74]

This proposal does not mean that negligence should be encouraged. An employer who negligently injures his employee, *e.g.*, by culpably failing to give him a safe place to work, should be liable supplementarily to workmen's compensation. This is the law in foreign countries and it has been demanded in this country for a long time. Surely, if an employer is careless toward his employees' safety, there is no reason why he should not pay damages if an injury results,[75] even though his enterprise is covered by workmen's compensation, which, under social laws operating regardless of fault, attempt, not to compensate for actual damages, but merely to enable the injured worker to continue to exist. Whether, however, the employer's negligence liability in supplement of compensation ought to be restricted to "gross" negligence is a question of legislative policy not to be discussed here. In its favor it might be argued that it is a purpose correlative to the social function of workmen's compensation law to take away from employers the burden of suits—often unwarranted—based on a strained construction of the term negligence and that therefore the employer should remain immune to workers' ordinary negligence

[73] High verdicts, however, can be had also in non-jury cases, such as under the Federal Tort Claims Act. For very recent examples, chosen at random, see Feathersmith v. United States, 104 F. Supp. 226 (E. D. Pa. 1952) ($56,000 for injuries of woman earning $46.80 a week); United States v. Grigalauskas, 195 F. 2d 494 (1st Cir. 1952) ($94,000 for back injuries); Cotant v. United States, 103 F. Supp. 770 (D. Idaho 1952) ($55,000 for child's ruptured urethra).

[74] The pattern of the Longshoremen's Act or the FECA, *supra*, notes 8 and 9, may be followed. Probably, however, neither the primacy of state law of the former act (see *supra*, note 31) nor the exclusion of judicial review under the latter would be adopted. The experience of the Longshoremen's Act is not always encouraging. *E.g.*, Mattison v. Brown, 197 F. 2d 414 (7th Cir. 1952) (finding against the claimant by Commissioner though there was "absolutely no evidence" in support of the denial).

[75] This solution was favored by Mr. Justice Brandeis, dissenting in New York Central R. R. v. Winfield, 244 U. S. 147, 154, 164-70 (1917). And see James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N. Y. U. L. REV. 537 (1952).

actions counting on sympathetic juries. If the limitation is adopted, however, care should be taken that the courts—or whoever will be the tribunals to hear and decide negligence suits in supplementation of compensation—do not construe "gross" negligence in such a manner that practically nothing is left for a cause of action short of quasi-criminal conduct.[76]

This and other details may be left to legal policy; but the situation that a mine worker, totally and permanently disabled in an industrial accident, in, say, Wyoming, receives a maximum benefit of $3,800 (!), whereas a similarly crippled railroad worker may get either nothing at all, if no negligence or faulty safety appliances can be proved,[77] or anything between very little and up to, maybe, $150,000 or more,[78] depending on the accidental fact of the jurors' moods and economic opinions —this situation has neither sense nor justice from any point of view.

[76] See *e.g.*, Day v. Gold Star Dairy, 307 Mich. 383, 12 N. W. 2d 5 (1943).

[77] See the cases *supra*, note 39, which of course can be multiplied *ad libitum* and to which the many unreported decisions and dismissals must be added as well as those railroad work-injuries that never reach the courts.

[78] For compilations of recent awards, both reported and unreported, above $50,000, see 9 NACCA L. J. 247 (1952); 8 NACCA L. J. 230 (1951); 7 NACCA L. J. 222 (1951); 6 NACCA L. J. 204 (1950).

DAMAGES FOR PERSONAL INJURY: THE IMPACT OF INSURANCE

LOUIS L. JAFFE*

I

The law grows daily more hospitable to insurability in lieu of fault as the premise of liability for personal injury.[1] The basic fact is the pervasive and systematic use of machinery. The consequence is high productivity and vast markets. These in turn have given rise to a concept of measurable risk and an ability to set aside part of the product to insure the risk. Judges no longer fear to accept this view, if not always overtly, as the major premise of the administration of the traditional concepts. But this creates certain contradictions which are only dimly felt or deliberately ignored. These seem to me to be particularly acute in the field of damages.[2]

In some situations the law has explicitly discarded the requirement of fault. A goodly number of courts, for example, having used *MacPherson v. Buick Motor Co.*[3] as a bridge, hold a manufacturer liable to ultimate consumers for "breach of warranty" without a showing of fault. But even where the law still insists on the syntax of fault and speaks this language it may characterize as negligent, conduct which by the earlier legal standard or by present colloquial standards is quite innocent. In a recent FELA case[4] an employee was alleged to have tripped on a clinker or piece of coal present on a railroad way. The presence of the clinker was held to be sufficient allegation of the railroad's negligence. I hazard the opinion that there are very few persons who believe that the failure to remove a stray clinker is a failure to observe the dictates of decent neighborly regard. The clinker is a *point d'appui*, a concrete entity around which it is possible to spin the speech of negligence. It would be a mistake, to be sure, to suppose that the older conceptions are

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[1] The literature is large. Most of it is collected in EHRENZWEIG, NEGLIGENCE WITHOUT FAULT 9 *et seq.* (1951). See particularly James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549 (1948); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

[2] Among those who stress and applaud the trend toward insurability there is practically no discussion of the damage problem. Ehrenzweig, however, who writes as much from the point of view of insurance as of tort liability, does suggest it. *Op. cit. supra* note 1, at 64. On the other hand see McNiece and Thornton, *Is the Law of Negligence Obsolete?*, 26 ST. JOHNS L. REV. 255, 274 (1952), discussed below at the conclusion of this article.

[3] 217 N. Y. 382, 111 N. E. 1050 (1916).

[4] Brown v. Western Ry. of Alabama, 338 U. S. 294 (1949). The case of course involves strictly only a pleading question. The plea was that defendant had allowed clinkers and other debris to collect along the side of the track so as to make the yards unsafe and that plaintiff had slipped on a clinker. The Georgia court held this an insufficient allegation of negligence; the Supreme Court reversed.

entirely ignored. The advance sheets teem with negligence appeals. Reversals for lack of evidence are not uncommon. Indeed recently the Supreme Court upheld the judgment of a court of appeals in an FELA case setting aside a verdict for lack of evidence.[5] There appeared to be no reason whatever for that august tribunal even to hear this case on certiorari. Perhaps certiorari was taken so that the Court might make somewhat ostentatious vindication of the power of the courts of appeals to preserve the tattered remnants of the older view.

But these spasmodic reaffirmations of the traditional law of negligence meet with disapproval and even at times with almost angry protest. Mr. Justice Black appears to believe that the sufficiency of the evidence is exclusively for the jury, at least if it is possible to imagine some theory of negligence.[6] His view does not reject the linguistics of negligence, but it denies the power of the judge to control the jury, a feature which is accepted for civil trials generally, and, so one would suppose, for negligence trials. I do not think that it is presumptuous to infer that for Mr. Justice Black negligence should not be a necessary predicate for recovery, at least by an employee against his employer. Of course that view is almost universally held in so far as it is embodied in an explicitly prescribed insurance scheme of workmen's compensation. But Mr. Justice Black is prepared to take a similar view of the tort action and so as it were to assert that one who is the victim of an insurable risk is justly entitled to recover.

Professor Fleming James has expressed[7] much the same feeling about liability for automobile injuries in an interesting but somewhat obscure thesis built around the concept of "accident proneness." His point appears to be that since negligence is attributable to accident proneness, and accident proneness is a character trait, a patterned way of responding, the concept of negligence is emptied of any element of blame. It is thought then to follow that since blame is absent, the concept of negligence is without significance either to create liability or to defeat it (contributory negligence). Essentially, of course, this is nothing other than a new and fashionable garb for determinism. That fault has become a deeply ingrained habit does not in the slightest negative the accepted notion of fault. Whether fault is an effect of free will is a question that each decides for himself, but the law, following the common instinct, treats fault as a moral dictum and not less so because it has become habitual. There is, however, no denying that for most of us the question of the individual's moral responsibility for fault arouses deep and discomforting metaphysical distress. The modern man is thus driven to avoid where possible solutions that invoke the concept of fault.

To some degree this solution has already been achieved by the notion that the

[5] Moore v. Chesapeake & O. Ry., 340 U. S. 573 (1951). (Black and Douglas, JJ., dissenting.) Other recent cases holding evidence insufficient are Jaroszewski v. Central R. R., 9 N. J. 231, 87 A. 2d 705 (1952), *cert. denied*, 73 Sup. Ct. 26 (1952) (Black, J., dissenting); Chesapeake & Ohio Ry. v. Thomas, 198 F. 2d 783 (4th Cir. 1952) (2-1); Eckenrode v. Pennsylvania R. R., 164 F. 2d 996 (3rd Cir. 1947) (2-1), *aff'd*, 335 U. S. 329 (1948) (5-4).

[6] Note his votes in the cases cited in note 5, *supra*.

[7] James and Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).

standard for judging the defendant's conduct is not his own but the "reasonable man's." In the majority of cases, however, the discourse concerning due care is in terms which the ordinary man would accept as his own, and were the standard seriously applied a defendant would be judged by the criteria which he more or less applies to his own affairs. But, even so, in the ordinary negligence case it is not the fault of the defendant which accounts for the law's concern; it is the injury to plaintiff. The defendant's fault (beyond the important fact of his bare connection with the plaintiff's injury) provides the law with a basis for compensating the plaintiff. It has become increasingly obvious that certain activities create foreseeable risks which society can afford to insure. If plaintiff has suffered injury of the foreseeable type, it seems that insurability is a much better reason for compensation than fault in the pallid sense in which it is now understood. And it has the superior virtue that the plaintiff recovers in every case.[8]

If then the judges have not entirely abandoned negligence they are under great pressure to do so from within and from without. Sensitive judges are caught in a dreadful cross-fire. The common law and statute enjoin them to talk the language of fault and to administer it in customary ways. Yet there is a pervasive atmosphere constantly suggesting that adherence to the concept is anachronistic and reactionary. This makes for continuous erosion both in doctrine and administration. It is this question of liability to which lawyers, judges, and scholars have for the most part directed their attention. But the question of damages on the other hand has had as yet very little attention. When liability rests on insurability rather than on notions of fault, there arise, as it seems to me, questions as to the rationalization of certain principles of compensation which are at present taken for granted.

II

I suggest that the crucial controversy in personal injury torts today is not in the area of liability but of damages. Questions of liability have great doctrinal fascination. Questions of damage—and particularly their magnitude—do not lend themselves so easily to discourse. Professors dismiss them airily as matters of trial administration. Judges consign them uneasily to juries with a minimum of guidance, occasionally observing loosely that there are no rules for assessing damages in personal injury cases.[9] There is analogy for this situation in Jerome Frank's complaint that fact finding, though of paramount importance, is neglected by teachers who devote themselves too exclusively to appellate law. This may reflect not so

[8] Clarence Morris warns us that we must not assume that an enterprise defendant is necessarily in a better position than plaintiff to insure. *Hazardous Enterprises & Risk Bearing Capacity*, 61 YALE L. J. 1172 (1952). Thus, fire risk is ordinarily more effectively and more bearably insured by plaintiff. This is the reason behind two much maligned cases which have always seemed to me correctly decided. Ryan v. New York Central Ry., 35 N. Y. 210, 91 Am. Dec. 49 (1866); Moch Co. v. Rensselaer Water Co., 247 N. Y. 160, 159 N. E. 896 (1928). However, in neither of these cases do the opinions proceed frankly on this basis, and it is the rationalizations which have given offense.

[9] In Atlantic Coast Line R. R. v. Withers, 192 Va. 493, 510, 65 S. E. 2d 654, 663 (1951), the court quoted the following from an earlier Virginia decision: "The settled rule is that, as there is no legal measure of damages in cases involving personal injuries, the verdict of the jury in such cases cannot be set aside as excessive . . . ."

much their judgment of relative importance (as Judge Frank supposes) as the relative adaptability of the subjects to conceptualization. And so it probably is with the subject of damages.

The size of the personal injury verdict has increased enormously in the last few years.[10] A number of factors have combined to swell it. The earliest of these has been the movement for the recognition and fuller protection of the imponderable interests of personality: freedom from mental distress—pain, sorrow, anxiety, irritation— in so far as these have been the consequences of socially unjustified activity. Judicial and legislative resistance to these demands has been considerably disarmed. This has coincided with a higher standard of living, a growing sense of entitlement to "security" (both of these resting on a constant rise in productivity), and finally a persistent inflation. These factors by reaction on each other multiply the product. Our concern about "security" grows as our stake in it grows and this in turn increases sensitivity to inflation. Here is a fertile field for pressure, a hothouse for "forcing."

We have come to accept almost without question the monetary evaluation of the immeasurable perturbations of the spirit. But why should the law measure in monetary terms a loss which has no monetary dimension? If *A* takes *B*'s chattel he should return it or pay for it; if he destroys it he has had his way with *B*'s goods and should pay. At least this seems clear where *A*'s conduct is blameworthy. *A* has or has had what is *B*'s and if the law can return to *B* the chattel or its equivalent it is acting on the maxim to each his own. The case provides an analogy for a case involving a total or partial destruction of *B*'s earning power. If A's act was innocent, under the modern law he has not had to pay. Though in a sense he may be said to have taken away, he has not received anything. Where, however, he has wrongfully deprived *B* of his earning power the law can and will order him to return its equivalent. But what of the apprehension of injury, and the pain and suffering of it? At this point the analogy to the deprivation of a valued good breaks down. This is clearly true of suffering which is in the past. It is less true for pain still to be faced. The pain I have suffered may leave me a better or a worse man, it may leave me with a memory of pain or a sense of gratitude for pain departed. To put a monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise.

When the defendant's conduct is reprehensible damages are an apt instrument of punishment.[11] The criminal law is often a clumsy and ineffective device for dealing with unsocial activity. The engines of public prosecution may be too

[10] The *Journal of the National Association of Claimants' Compensation Attorneys* (NACCA) publishes lists of verdicts of over $50,000. Its list is often referred to by courts to justify large verdicts. This Association is, as the name implies, an association of "plaintiff" attorneys. There have, of course, for many years been associations of insurance attorneys and agents whose activities and journals are devoted to the minimization of liability. The NACCA is a "countervailing" trade journal devoted to maximizing liability and, if understood to be such, serves a useful informative and argumentative function.

[11] There are valuable thoughts and citations on exemplary damages in Professor Ehrenzweig's report for the New York Law Revision Commission: MULTIPLE DAMAGES, LEG. DOC. (1944) No. 65 (J).

ponderous or too busy with high crimes. The tort law serves as a useful supplement or alternative. To pay money to one's victim is a salutary humiliation. The victim is the focus of the communal sense of having been wronged. The receipt of money particularly from the wrongdoer assuages a justified sense of outrage. It is true that here the law does operate without any adequate premise for measurement or alternative. To pay money to one's victim is a salutary humiliation. The as society holds that punishment serves a useful function. It is perhaps possible to provide a measure by relating monetary punishment to the size of the defendant's income.[12] Many courts arbitrarily restrict punitive damages, probably a wise expedient in an area where there is no guide to judgment.[13]

Rationalization becomes more obscure and wavering when the defendant's conduct is merely negligent rather than willful. It is customarily said that the purpose of a tort action is compensation rather than punishment, particularly where the gist of the action is negligence. When the plaintiff's damage is restricted to mental distress the courts have quite consistently denied any recovery but once given physical injury as a predicate, pain and suffering is allowed as "parasitic damage."[14] The court will invariably admit that there is no measure for its valuation but it is thought that justice nevertheless demands its equation into money. In a recent FELA case[15] $40,000 was allowed for pain and suffering. It might just as well have been $10,000 or $100,000, though a court sometimes by an intuitive judgment, sometimes by rote, will set limits. A factor of such dimensions and yet so subject

[12] In tort cases involving a punitive element many courts allow a showing of the defendant's wealth, though some do not. *E.g.*, Pendleton v. Norfolk & Western Ry., 82 W. Va. 270, 95 S. E. 941 (1918), annotated 16 A. L. R. 771 (1922). See discussion in Wilson v. Onondaga Radio Broadcasting Corp., 175 Misc. 389, 23 N. Y. S. 2d 654 (Sup. Ct. 1940) disapproving of evidence as to defendant's wealth.

More rarely do courts consider the defendant's poverty in reducing damages. *E.g.*, Jackson v. Briede, 156 La. 573, 100 So. 722, 726 (1924).

Ehrenzweig, *Assurance Oblige*, 15 LAW & CONTEMP. PROB. 445, 447 (1950), notes that some of the European codes permit the court to consider relative wealth in assessing damages in tort cases; the idea is not restricted to cases of punitive damages.

[13] See notes in 16 A. R. L. 761 (1922), 123 A. L. R. 1136 (1939), 17 A. L. R. 2d 527 (1951).

[14] It will be remembered that Street in a well-known passage in his *The Foundations of Legal Liability* (Vol. I, at 470 (1906)) said in speaking of "mental distress":

"The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability. It is merely a question of social, economic, and industrial needs as those needs are reflected in the organic law."

At Page 475, Street asks whether a recognition of mental distress does answer to "the needs of a complex and enlightened society." He seems to doubt it. He quotes Lurton, J., dissenting in Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 721, 8 S. W. 574, 582-583 (1888):

"Such injuries are generally more sentimental than substantial, depending largely upon physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all of the objections to speculative damages . . . That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury, with justness, not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected."

In so far as Street's pronouncement involved a prophecy it has come true only in part. Mental distress is still not an independent basis of liability in negligence actions but the elimination of the requirement of "contact" leads to that result.

[15] Southern Pac. Co. v. Guthrie, 186 F. 2d 926 (9th Cir. 1951) discussed in the text *infra*.

to whim would appear to call for a fairly convincing rationalization. The reasoning often used is that plaintiff has in fact suffered "something," an injury, and defendant, a wrongdoer, should not be excused merely because this something has no determinable monetary equivalent. This reasoning does not necessarily rest on a premise of punishment. The fault of the defendant is pointed to in order to justify compensation for the plaintiff's loss and particularly to counter the suggestion that the law should not make a finding for which there is no standard of judgment. It is the defendant, the argument runs, who has created the predicament. He cannot complain.

But why we may ask *should* the plaintiff be compensated in money for an experience which involves no financial loss? It cannot be on the principle of returning what is his own. Essentially that principle rests on an economic foundation: on maintaining the integrity of the economic arrangements which provide the normally expectable basis for livelihood in our society. Pain is a harm, an "injury," but neither past pain nor its compensation has any consistent economic significance. The past experience is not a loss except in so far as it produced present deterioration. It will be said, however, that these arguments betray a limited, a Philistine view of the law's concern, one that the law has happily transcended. This objection mistakes the argument. Of course the law is concerned, and properly so, with other than economic interests. The criminal law and the tort law *in so far as punitive* (that is to say in so far as the conduct of the plaintiff warrants punishment) is much concerned with the protection of non-economic interests; and to punishment may be added judicial remedies of a preventive character such as the injunction against nuisances, invasions of privacy, etc., and legislative devices such as zoning.

I am aware, however, that though the premise may elude detection, some deep intuition may claim to validate this process of evaluating the imponderable. One who has suffered a violation of his bodily integrity may feel a sense of continuing outrage. This is particularly true where there has been disfigurement or loss of a member (even though not giving rise to economic loss). Because our society sets a high value on money it uses money or price as a means of recognizing the worth of non-economic as well as economic goods. If, insists the plaintiff, society really values my personality, my bodily integrity, it will signify its sincerity by paying me a sum of money. Damages thus may somewhat reestablish the plaintiff's self-confidence, wipe out his sense of outrage. Furthermore, though money is not an equivalent it may be a consolation, a solatium. These arguments, however, are most valid for disfigurements or loss of member giving rise to a continuing sense of injury. (And in such cases there may be potential economic injury which cannot be established.) It is doubtful that past pain figures strongly as present outrage. And even granting these arguments there must be set over against them the arbitrary indeterminateness of the evaluation. Insurance aside, it is doubtful justice seriously to embarrass a defendant, though negligent, by real economic loss in order

to do honor to plaintiff's experience of pain. And insurance present, it is doubtful that the pooled social fund of savings should be charged with sums of indeterminate amount when compensation performs no specific economic function. This consideration becomes the stronger as year after year the amounts set aside for the security account become a larger proportion of the national income.

It is not supposed, however, that even were the reasons of the best—and mine I am sure will fail to satisfy many—the courts will forthwith deny the right of the plaintiff to have these intangibles valued. But putting aside for the moment their bearing on legislation, I would suggest that they are not irrelevant to the judicial creation of new remedies and new items of damage; nor to the judicial administration of present items of damage.

A wry history of the attempt to measure—to "quantify" as the English judges have it—the immeasurable is found in a group of English cases dealing with damages for "the loss of expectation of life." In *Flint v. Lovell*[16] the plaintiff, a "more or less wealthy" man of 70, had been negligently injured and his expectation of life shortened by 8 years (as it then seemed).[17] He was given only a year to live. The trial court awarded him £4000 for the loss of "8 years of pleasant living." In 1937 the meaning of this decision was tested in *Rose v. Ford*.[18] Mabel Rose, a young woman of 23, was negligently injured, became unconscious almost at once, and died four days later. An action was brought by her administrator under the Law Reform Act of 1934 which for the first time provided for the survival of an action of a deceased. A majority of the judges of the Court of Appeal thought that *Flint v. Lovell* was inapplicable because Miss Rose was never aware that her expectation had been shortened. If damages were to be awarded they agreed that £1000 would be a fair amount. But the House of Lords would not have it so. The action was for such damages as Miss Rose could have collected had she lived. Said Lord Wright, "A man has a legal right that his life should not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value. . . ."[19] The Lords were not unaware of the difficulty of the task. Damages should be assessed in "a moderate way." The jury should use "common sense" and give "what is fair and moderate, in view of all the uncertainties and contingencies of human life. Special cases may occur, such as that of an infant or an imbecile or an incurable invalid or a person involved in hopeless difficulties."[20]

[16] [1935] 1 K. B. 354. Sir Frederick Pollock commenting on the case at the time (51 L. Q. REV. 268 (1935)) asserted that though "the expectation of life is a thing of temporal value" and the loss of it an admissible element of damage, one cannot say that the shortening of one's own life is a detriment. ". . . it is not possible for any human tribunal to attach any definite meaning to the term or, for that matter, to say whether death, when it happens, is in itself a bad or a good thing."

This distinction would probably have made no difference in *Flint v. Lovell*, but it would be pertinent to Rose v. Ford, [1937] A. C. 826, when the injured person was unconscious from the time of injury to the time of death. Pollock doubted whether in any case damages should be awarded on this head since there was a danger that the plaintiff would be twice compensated for the same detriment.

[17] The prognosis was made sometime in 1934. As appears in Rose v. Ford, [1937] A. C. 826, he was still alive in June of 1937. Of course, he would still have suffered the anticipation of death, but Rose v. Ford makes clear that that is not the element being "quantified."

[18] [1937] A. C. 826. [19] *Id.* at 848. [20] *Id.* at 850.

But the trial judges thereafter were somehow unable to discover what the common sense of England was on this head. Was compensation to be in direct proportion to life expectancy? Was the loss more heavy to the rich than to the poor? Verdicts ran from £90 to 1200£. And in 1940 the House of Lords had to be called in to pronounce the dictates of common sense concerning the value of varying intervals of life's term.[21] A trial judge had awarded £1200 for the loss of expectancy of a 2½ year old infant who had been instantly killed. It appeared to him that the infant had lost at least as much as Miss Rose. The Court of Appeal refused to disturb the verdict, one of the judges because the problem set was insoluble. He could not say £1200 was wrong since he had no idea what the proper figure was. Goddard, L. J., was for reducing the figure to £350. Lord Chancellor Simon, writing for the House of Lords, thought the problem "more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a Court of law, but in view of the earlier authorities, we must do our best to contribute to its solution."[22] Then followed much talk about the factors of happiness and unhappiness, youth and age, the risks and uncertainties of childhood. In this linguistic alembic by a process almost alchemical the Lords arrived at the conclusion that £200 (!) would be "a proper figure." The opinion concludes with a gentle warning (common sense having proved unreliable) "I trust that the views of this House . . . may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy."[23]

Nowhere in this whole history is there the glimmer of a suggestion of the social function which is served by undertaking this task "more suitable for discussion in an essay on Aristotelian ethics." Lord Wright felt called upon to vindicate the propositions that a man has a "legal right" not to have his life shortened tortiously and that life expectancy is a thing of "temporal value." And if as *Flint v. Lovell* held a man still alive could recover for the loss of expectancy (a somewhat more appealing proposition since here there is at least the motive of a solatium for future woe), the survival statute should be read as requiring recovery despite death.

The difficulty is certainly not entirely of the court's making. The survival statutes are themselves the product of an abstract rationalistic reform movement that continues to operate in the field of torts without regard either to the present problem or the present trend in solving it. These statutes are passed to abolish the "outmoded" "arbitrary" rule that personal actions do not survive the death of either party. It does not of course require any great perspicuity to perceive that the distinction pursuant to which contract actions survive and tort actions do not is "arbitrary" at least as generalization. The reasons may be historical ones not clearly understood,[24] perhaps irrelevant if they were. It is not, to paraphrase Holmes, a

[21] Benham v. Gambling [1941] A. C. 157. [22] *Id.* at 166. [23] *Id.* at 168.

[24] See Winfield, *Death As Affecting Liability in Tort*, 29 COL. L. REV. 239, 244, 250 (1929). In a broad sense the explanation of the distinction may be rather simple. Originally personal actions were thought of as resting in personal obligation between plaintiff and defendant. They were non-

sufficient reason to deny a valid claim that the law was so in the time of Henry IV but neither is it a reason to create a new cause of action that it will eliminate a distinction which is no longer understood. The satisfaction of the theorists' desire for elegant jurisprudence should not be purchased with other people's money.

There is no room here to study and criticize the unutterable confusion of statutes in each state where the deceased has come to his death as a result of negligent injury. What is needed first is an inventory of the legitimate claims which arise by reason of death. There can be no thought that the arrangements will be thoroughly logical in terms of any one rationalization. In my opinion the basic rationalization is to satisfy the legitimate economic expectations which have been defeated. In some cases death will be a windfall because a fund will be provided that the deceased could never himself have amassed. In other cases recovery will fall short. In addition to expectations of long term support which have been defeated, there may be losses to those who had claims against the deceased because the suddenness of death will have prevented the deceased from making expectable security arrangements. It may in short be difficult to evolve precise formulas which provide for all legitimate economic claims. But I cannot think that putting it to a jury to evaluate "pain and suffering" or the loss of the expectation of life is a rational approach to the problem. It means for one thing that the interest of creditors, heirs, and dependents is made to turn on the particular way in which deceased came to his death.

If it is said that these vague formulas are used to assuage the feelings of pain and outrage of the living relatives, we are back again to the question whether these are proper items of compensation under the present conditions of liability. This is in some measure the question in another class of cases—those dealing with the death of small children. In at least one recent case[25] damages were awarded for the death of a viable foetus. The case is thought to be the occasion for high jurisprudential speculation as to when and whether a foetus becomes a "personality." ". . . [I]t is but to deny a palpable fact to argue that there is but one life and that

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assignable and did not pass to representatives. Exceptions were made by statute or decision as need or justice appeared to require. Such considerations were less exigent in the type of offense which was peculiarly personal, *i.e.*, which was an invasion of the plaintiff's personality. Heirs might expect to inherit the deceased's real and personal property intact but what was personal to the deceased would inevitably vanish with him.

[25] Verkennes v. Cornica, 229 Minn. 365, 38 N. W. 2d 838 (1949). The court admitted that its ruling was against the great weight of authority. Indeed there appears to be almost no support for it. See 10 A. L. R. 2d 639 (1950).

A very different question is whether a living child can recover for pre-natal injuries. For some time the dominant view was against recovery based on Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567 (1921). The current authority is moving in the other direction: Woods v. Lancet, 303 N. Y. 349, 102 N. E. 2d 691 (1951), *overruling*, Drobner v. Peters; Damasiewicz v. Gorsuch, 79 A. 2d 550 (Md. 1951); Tucker v. Howard L. Carmichael & Sons, 208 Ga. 201, 65 S. E. 2d 909 (1951); Williams v. Marion Rapid Transit, 152 Ohio St. 114, 87 N. E. 2d 334 (1949). *But see* Bliss v. Passanesi, 326 Mass. 461, 95 N. E. 2d 206 (1950); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N. W. 2d 229 (1951).

It is a measure of the reasoning in the *Verkennes* case that it relied on cases allowing a living child to bring damages for pre-natal injury. In the opinion of the court the question was whether the viable foetus was a person.

the life of the mother." But essentially the question is whether social justice dictates the compensation of the severe emotional distress in the loss of a child. Either general death or special statutes provide for compensation for the death of a minor child in terms of "pecuniary loss" or dependency. The most common element is the net loss to the parents from the loss of services of the decedent during minority. A strict adherence to this element would in many cases result in a denial of recovery. Where the child is still young costs of nurture will exceed the value of any expectable services; and in many families very little in the way of services will ever be demanded or expected. Yet it has been said that some pecuniary loss is presumed.[26] Otherwise it is argued, the statute would be rendered "nugatory."[27] One can only wonder what this means. If the purpose of the statute is to punish fault the observation is just but not if it is to compensate pecuniary loss. In judicial reactions of this sort we have strong evidence of the prevailing institutional confusion in the compensation of personal injury. One, of course, should expect a "skew" at this point. The death of a minor child is not only one of the most excruciating of distresses but one which most easily evokes sympathy. Generosity vouches for the sincerity of the emotion. Through the lawsuit the experience of sorrow can be transmuted into a personalized struggle between right and wrong. The defendant, however minimal his misdoing, is the sacrificial scapegoat, his pelf is the pledge of our sincerity.

The recent case of *Hitaffer v. Argonne Co.*[28] is another instance where decision is made to turn on a series of fashionable propositions quite divorced from their function in the current scene. There the court held that a wife could recover from her husband's employer for a negligent injury to the husband which disabled him from sexual intercourse. It has been the law that the hubsand can recover for the loss of "consortium," though usually as an element of loss of service. It has also been the law that both can recover for intentional interference. These propositions being so the court could see no reason for denying the wife recovery in a case of negligence. It pointed to the fact that women have been emancipated. It ridiculed the reasons given for the distinction, *e.g.*, that the injury to the wife is indirect; that the husband's suit is based primarily on the loss of service whereas the wife does not have such an action. It expatiated on the "modern concepts of the marital

[26] See Van Cleave v. Lynch, 109 Utah 149, 166 P. 2d 244 (1946), upholding a verdict of $10,000 for death of a 6 year old boy, the court admitting that damages were primarily for loss of society, etc. and reviewing a number of verdicts in other cases, two of them for $15,000.

In Couch v. Pacific Gas & Electric Co., 80 Cal. App. 857, 183 P. 2d 91 (1947), a verdict of $27,500 for death of a child of 10 months was reduced to $15,000 and allowed to stand.

In Immel v. Richards, 154 Ohio St. 54, 93 N. E. 2d 474 (1950), the jury awarded $5,000 for the death of a 9 months old child. The award was upheld, Taft, J., dissenting, on the ground that there was no evidence from which to make such a finding in terms of the statute's criterion of "pecuniary injury."

In Checketts v. Bowman, 70 Ida. 463, 220 P. 2d 682 (1950), a verdict of $40,000 for death of a child of 9 years was reduced to $20,000 and allowed to stand at that. See *infra* for the interesting sequel to this case.

[27] Sweeten v. Pacific Power & Light Co., 88 Wash. 679, 153 Pac. 1054 (1915).

[28] 183 F. 2d 811 (Dist. Col. 1950), *cert. denied*, 340 U. S. 852 (1950).

relations." The wife *is* permitted to recover for a willful interference. If the loss of consortium is protected against willful interference it "must be predicated on a legally protected interest." And if it is "legally protected" it must equally be protected against negligent interference. To distinguish is "neither legal nor logical." But the law, of course, often distinguishes between willful and negligent interference as in the cases of emotional distress. An interest is protected only in so far as it serves a social purpose to protect it. When the act is willful the law may award damages for penal purposes. But more basically the law quite properly recognizes that a willful assault on the personality inflicts a far more serious blow. It is almost unthinkable that a court should reduce consortium to the bare element of the opportunity for sexual intercourse and pretend to see no basic difference of offense to the wife's interest between the incidental loss of that opportunity and the deliberate destruction of the whole marital relationship.

More persuasive is the argument that since the husband has an action, so should the wife. But his action is a fossil from an earlier era. It is one of a group of archaic actions based on the notion that the paterfamilias was alone competent to sue for losses suffered by the family unit. The husband was entitled to his wife's service and this included the sentimental elements of her person and presence. The law did not seek to set a value on consortium[29] as such. When to the husband's action, there is now added the wife's action for negligent injuries (which being emancipated she is entitled to bring) there is a danger of duplicating elements of damage. Ingenious efforts must be made to disentangle from the wife's recovery the constituents of the husband's cause of action. Indeed, the emancipation argues for the restriction or abolition of these actions rather than their extension. Some courts have been bold enough entirely to abolish the husband's action;[30] and one has restricted the husband to the loss of services previously enjoyed, refusing to allow loss of consortium to be valued in either direction.[31] It is still no doubt an element of recovery that the plaintiff has been incapacitated for intercourse;[32] but in any scheme of compensation, impairment of function presents a stronger claim than the sorrow or disappointment of relatives and friends.

It was argued also in the *Hitaffer* case that the compensation act was intended to cover the entire obligation of the employer arising from the employee's injury. This argument has since prevailed in three jurisdictions[33] and had the court been troubled simply by the formal inequality of husband and wife it might be thought

[29] See the excellent opinion in Marri v. Stamford Street R. R., 84 Conn. 9, 78 A. 582 (1911).

[30] Marri v. Stamford Street R. R., *supra* note 29; Bolger v. Boston Elevated Ry., 205 Mass. 420, 91 N. E. 389 (1910); Helmstetler v. Duke Power Co., 224 N. C. 821, 32 S. E. 2d 611 (1945).

[31] Felton v. Wedthoff, 185 Mich. 72, 151 N. W. 727 (1915).

[32] But in *Felton v. Wedthoff, supra* note 31, where a husband had been hospitalized, the court refused to permit a valuation of the separation from his wife. The court said rather broadly that loss of consortium would no longer be valued. It appears to be a well-established doctrine in the federal courts that diminutions of family pleasures, *e.g.*, ability to play with one's children, are not compensable and, therefore, it is error to put in evidence that one has a wife or children. See Slattery v. Marra Bros., 186 F. 2d 134, 137 (2d Cir. 1951).

[33] Bevis v. Armco Steel Corp., 156 Ohio St. 295, 102 N. E. 2d 444 (1951); Napier v. Martin, 250 S. W. 2d 35 (Tenn. 1952); Guse v. A. O. Smith Corp., 260 Wis. 403, 51 N. W. 2d 24 (1952).

that it would have gladly taken this way out. But says the court, ". . . it would be contrary to reason to hold that this Act cuts off independent rights of third persons. . . . A brief examination of it will reveal that there is no provision therein for compensating a spouse for the loss of consortium."[34] A somewhat less brief examination of the statute will reveal that the interests of spouse and children are within its ambit. The statute has in mind the husband or the wife as the head of a family or as one having dependents.

One journal approving *Hitaffer v. Argonne Co.* has this to say:[35]

> Courts are living in a practical world and must recognize the facts of life. Here was a healthy man, living with his wife and enjoying normal sexual relationships. *Along comes an employer who by negligence* makes those sexual relationships impossible.

In this statement we have a striking and illuminating example of the playing of both ends against the middle which is characteristic in this field. When the question is *proof* of negligence every argument is mustered to eliminate a requirement that negligence be proved in a sense that would support a finding of moral delinquency. It is emphasized that the action is compensatory rather than punitive. As we have seen, Professor James' thesis of "accident proneness" attempts completely to destroy the frame of moral reference. The more usual insistence on negligence as the departure from the objective "standard" moves in the same direction. The availability of insurance makes it increasingly difficult to insist on the relevance of the standard of due care. The most trivial departures from an assumed standard serve to move the case past the judge to the jury. Once the propriety of this approach to the question of liability is insisted upon it is disingenuous to place much weight on fault as a specific factor justifying damages.

The above quotation particularly emphasizes the point. In its subtly anthropomorphic version of the employer it is doubly disingenuous. Employers in these times almost never "come along," because they are corporations. It is a fellow employee who has been negligent. There will be some who read this assertion with horror; it may appear to revive the unhallowed spectre of the "fellow servant rule." And it will be asked, too, whether the author has ever heard of respondeat superior. Holmes, it will be recalled,[36] thought that the doctrine of respondeat superior was a mere remnant of patriarchal notions of identification, survival of a time when wife, child, and servant were in "the power" of the husband, father, and master; when indeed the servant was a slave without personality, forfeitable if he injured another as a noxious thing which the master by paying could redeem. Amazingly Holmes could find no reason or basis in modern law for charging an employer with

[34] 183 F. 2d at 820.

[35] 5 NACCA L. J. 201 (1950) (italics supplied). *Cf.* the indignation expressed in 8 NACCA L. J. 119 (1951), over a decision denying damages under FELA to the non-dependent adult children of a negligently killed worker: "To allow a railroad, negligently killing a father, to escape all liability . . . is unjust. . . . Had the railroad killed a valuable hunting dog, substantial damages would be allowed. "NACCA hopes some day that the courts will find a way of compensating adult, self-supporting children; or that Congress will so order by an amendment to the FELA." To what end?

[36] *Agency*, 4 HARV. L. REV. 345, 5 HARV. L. REV. 1 (1891).

the employee's torts. If by that doctrine one seeks to prove that the employer is a tortious wrongdoer he would indeed be invoking a fiction of identification.[37] But it is now common ground both that the doctrine involves no fiction if correctly understood and that it is perfectly sound and desirable. The entrepreneur liable for his employee's negligent act is charged not because he "came along" but because he assumes to embark upon an enterprise creating certain risks for which he may make provision. Because he is in this position he is better able than the injured party to bear the loss. It would be an anachronism, no doubt, to suppose that the doctrine arose or was initially preserved in response to so explicit a formulation. Yet is one not entitled to suppose that some such ideas were dimly felt long before they were expounded? In any case this is its rationalization for our times; this is its function. When we put the situation thus, it is no longer open to us to justify an award to the wife on the premise that she has been victimized by the employer corporation. We must ask, rather, whether placing a money value on this sorrow serves a sufficiently valuable function to make it a legitimate charge against the national insurance funds.

Some of this same confusion, incidentally, is found in the cases dealing with recoveries by plaintiffs for items of damage which they would have suffered had they not been insured or had they not been the recipient of a gift. In the early New York case of *Drinkwater v. Dinsmore*[38] the plaintiff injured by the servants of the defendant was denied damages for loss of wages because his employer had voluntarily paid them. "This was not a case for exemplary damages," said the court. "The plaintiff was entitled to recover, in addition to what a jury might award him for his suffering and physical injuries, only his pecuniary loss."[39] This appears a sensible view, but it has been nearly universally condemned.[40] It is said to relieve the "wrongdoer" from the consequences of his wrong, to give him a windfall. In the minds of those who thus argue it is as if the negligent act had some specific monetary dimension of wrongfulness[41] rather than simply providing the basis for

[37] In some jurisdictions penal damages may be awarded against the corporation for the misconduct of a servant however lowly. See MCCORMICK, DAMAGES 285 (1935).

In an interesting recent case, Haser v. Pape, 50 N. W. 2d 240 (N. D. 1951), a taxicab company was held liable for rape committed by a driver. On the first trial a verdict of $10,000 was returned against the driver (verdict directed in favor of taxicab company). On reversal of the direction in favor of the company a retrial against the company alone resulted in a verdict of $650. This the trial judge set aside as inadequate and his ruling was sustained. In a subsequent suit against the company's insurer on the $10,000 verdict against the driver it was held that provisions in the insurance contract excluding liability for positive misconduct would be effective at least in so far as the liability of the driver was concerned. The question was left open as to whether it would exclude liability of the company, since it was under a statutory duty to insure. Haser v. Maryland Casualty Co., 53 N. W. 2d 508 (N. D. 1952).

[38] 80 N. Y. 390, 36 Am. Rep. 624 (1880). [39] *Id.* at 392, 36 Am. Rep. at 625.

[40] *See* Landon v. United States, 197 F. 2d 128 (2d Cir. 1952). A note however in 63 HARV. L. REV. 330 (1949), takes the view proposed in the text. It points out that the majority doctrine confuses a penal with a compensatory view. And at 337 it states more broadly ". . . if the ultimate cost of certain torts or breaches of contract is to be paid by society, the rules of damages must be readjusted."

[41] See, *e.g.*, Campbell v. Sutliff, 193 Wis. 370, 374, 214 N. W. 374, 376 (1927), where the court talks about the "wrongful acts of the tort-feasor" and states that "the extent of the liability of the wrongdoer is dependent upon the extent of the injuries inflicted by his wrongful act. . . ." Yet here not the defendant but his servants were negligent.

the plaintiff's well-being. Where the plaintiff's pay or hospitalization is insured or guaranteed by contract there is an argument that a deduction would deprive the plaintiff of a contractual interest for which he has paid and give the defendant the benefit of something for which he had not paid.[42] Even here an appropriate statutory scheme would require the defendant to pay the insurance fund and thus reduce the insurance cost rather than give the plaintiff a double recovery; and this is the principle which now generally prevails in workmen's compensation and fire insurance.

We have so far been dealing with substantive problems. Let us turn for a moment to judicial administration. In *Affolder v. New York, C. & St. L. R. R.*,[43] the plaintiff, 35 years of age, lost his leg. He had been earning $400 per month; he had an expectancy of 37 years. He suffered pain and could be expected to suffer further pain; he would need more surgery. He would need an artificial limb of a special type. The jury awarded him $95,000. The trial judge reduced the verdict to $89,000. He calculated a 60 per cent loss of earning power for a total loss of $70,000. He compared other cases dealing with loss of leg. There should, he thought, be some uniformity. In 1944 a verdict of $60,000 had been reduced to $40,000.[44] No one, admitted the judge, can evaluate "with any degree of accuracy what amount of money will compensate plaintiff for the pain and suffering he has sustained" but "we cannot escape the belief in this case that the sum agreed upon by the jury exceeds what has heretofore been determined to be a fair sum."[45] The remittitur was made. On appeal by the railroad the court said, "The assignment of error that the verdict is excessive is not properly addressed to this court."[46] And finally the Supreme Court said, "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous. . . ."[47]

This word "monstrous" is the only recent contribution of the Supreme Court to a question which has split the federal courts of appeals for some time.[48] Most of them hold the doctrine that a court of appeals is without authority to review a claim that damages are "excessive." ". . . the amount of a verdict is primarily a

[42] The note writer in 63 HARV. L. REV., *supra* note 40, argues that even so the insurance is not a saving but a purchase of security. Would a completely logical view be to charge the cost of premiums to the defendant?

[43] 79 F. Supp. 365 (E. D. Mo. 1948).

[44] *See* Cunningham v. Pennsylvania R. R., 55 F. Supp. 1012 (E. D. N. Y. 1944).

[45] 79 F. Supp. at 370.

[46] New York, C. & St. L. R. R. v. Affolder, 174 F. 2d 486, 493 (8th Cir. 1949).

[47] Affolder v. New York, C. & St. L. R. R., 339 U. S. 96, 101 (1950). The court of appeals, however, had not so characterized the reason for its ruling.

[48] Southern Ry. v. Bennett, 233 U. S. 80, 87 (1914) is authority for the proposition that "a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for reexamination here *upon a writ of error.*" (Italics supplied.) It has been thought that this limitation on the power of the appellate court may have arisen from the fact that on writ of error only the judgment roll came up and that under the old practice the record thus did not contain motions for new trial or the rulings on them. Hand, J., in Miller v. Maryland Casualty Co., 40 F. 2d 463 (2d Cir. 1930); but Brandeis, J., in Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474 (1933) explains that the writ of error is no longer restricted and if the appellate court cannot pass on a claim of excess it is now for other reasons.

factual evaluation on inabsolute elements, while our function has been regarded as extending only to a testing of the soundness of the processes by which such a result has been achieved."[49] Motions to set aside a verdict as excessive are to be addressed solely to the discretion of the trial judge. Courts that hold to this view, however, may point to an excessive verdict as showing that error has been prejudicial.[50] And it is generally said that an excessive verdict may suggest the influence of "passion and prejudice"; however, courts are hesitant so to convict a jury unless counsel has interjected elements of passion and prejudice. The fourth and ninth circuits, however, claim a limited authority to review "excessiveness as such."[51] In the recent case of *Southern Pacific Co. v. Guthrie*[52] the verdict was for $100,000. The court of appeals was of the opinion that no more than $60,000 of this was attributable to loss of earnings, though conceivably the jury's calculation of loss of earnings was $70,000. This left $40,000 for intangibles. This verdict said the court was "too high." But does the court of appeals have power ever to order a remittitur? "Yes," said all except one member of the court. The *Affolder* case was thought to imply such a power.[53] But said a majority of the judges the power could be exercised only if the verdict was "monstrous" which interpreted means "grossly excessive"; and $40,000 for pain and suffering was not "grossly excessive." With this conclusion three of the judges disagreed. In Denman's opinion if the amount is "substantially" more than appellant should pay it is a denial of justice to make him pay; he is being required to pay more than he "owes."[54] Said Stephens, J.,[55]

> I cannot go along with the so-called "monstrous" doctrine. It seems to me that by adopting it we give up all attempt to square the judgment with a reasonable basis for its support. I would think a million dollar judgment for the loss of a little finger would be monstrous (though I have none to sell at that figure) but I don't know about a ten or twenty thousand dollar judgment. . . . I cannot believe that our system of jurisprudence places everybody's material fortune, such as our free enterprise enables us to accumulate, at the unbridled whim of any twelve men and women. . . .

[49] *See* St. Louis Southwestern Ry. v. Ferguson, 182 F. 2d 949, 954 (8th Cir. 1950). In Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474 (1933), Brandeis, J., noted (at 485) "This Court has frequently refrained from disturbing the trial court's approval of an award of damages which seemed excessive or inadequate, and the circuit courts of appeals have generally followed a similar policy. Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion, we have no occasion to determine." (The *Fairmount* case dealt with an inadequate verdict.)

[50] St. Louis Southwestern Ry. v. Ferguson, *supra* note 49. Here plaintiff's counsel improperly suggested to the jury that defendant had sought to suppress evidence, etc.

[51] Cobb v. Lepisto, 6 F. 2d 128 (9th Cir. 1925); Virginian Ry. v. Armentrout, 166 F. 2d 400 (4th Cir. 1948).

[52] 186 F. 2d 926 (9th Cir. 1951), *cert. denied*, 341 U. S. 904 (1951).

[53] The eighth circuit (whose decision was reviewed in the *Affolder* case) expresses doubt whether that case meant to imply a power to review for excessiveness. St. Louis Southwestern Ry. v. Ferguson, 182 F. 2d 949 (8th Cir. 1950). But in Missouri-K-T-R Co. of Texas v. Ridgway, 191 F. 2d 363 (8th Cir. 1951) the court said that whether the verdict was "monstrous" it need not decide; it was however "so excessive as to shock the conscience." On that basis it held that certain improper appeals to the jury by plaintiff's counsel were reversible error; even that stops short of reducing a verdict simply because excessive.

[54] 186 F. 2d at 933.

[55] *Id.* at 934.

The following year a division of the ninth circuit[56] did hold that a verdict of $35,000 for the death of an 8 year old son was "monstrous" and ordered a remittitur of $15,000.[57]

This difference between the courts of appeals is probably one of degree. The Supreme Court's epithetical "monstrous" implies that a verdict may be so large that a refusal to set it aside is an abuse of discretion. It is in the nature of the problem that it is almost impossible to give further character to the notion of "monstrous" or "grossly excessive." Perhaps the touchstone is initial shock and astonishment that a jury could so decide or a belief that juries generally would have given far less. Perhaps it is the ratio between the economic loss and the award for intangibles. It is enough for some of the judges of the ninth circuit that the verdict is very much larger than it "should" be; and that the defendant is thereby being required to pay more than he "owes"; there is in this form of rationalization an implication of an absolute touchstone which, I am afraid, will elude detection.

What is clear, I think, is that the majority approach to the problem of appellate control tends toward the progressive maximization of damages. This statement may appear to be a truism, since in any one case the refusal of the appellate court to intercede will always mean that damages are not reduced. But it would be at least logically possible for a trial judge to control damages as closely as an appellate body. Yet in fact we would not expect that to happen. The trial judge is subject to the same influences as the jury: the presence of the plaintiff in the courtroom, the dramatization of his predicament, the impersonality of the defendant, so often incorporated or insured or both. And the trial judge is further influenced by the jury itself. He has established a personal relation with them. He may not wish to appear either to them or to himself less generous, less understanding, or less sympathetic. These factors, in my opinion, point toward the soundness of the attitude expressed by the ninth circuit judges in *Southern Pacific Co. v. Guthrie.* There may be no absolute basis upon which the appellate judges can exercise their control but they can introduce an element of measure and uniformity, a particularly desirable objective in an area of insurability.

I suspect that underlying the somewhat confused and latitudinarian judicial approach in these damage matters is the contingent fee. It is clearly established in this country that lawyers' costs are not recoverable by the winning party. As long as this is true, plaintiff's recovery will be reduced from 20 per cent to 50 per cent. Thus, however carefully calculated the plaintiff's economic loss, the plaintiff's "take-home" may be substantially less. No court without working a drastic change in the law can overtly make an allowance for the lawyer's fee. But until our system of com-

[56] Two of three were Denman and Stephens.

[57] Covey Gas & Oil Co. v. Checketts, 187 F. 2d 561 (9th Cir. 1951). The case had involved what Denman characterized as "forum shopping." The plaintiff had first procured a judgment of $40,000 in the state court of Idaho; the Idaho Supreme Court had ordered a remittitur of $20,000. Checketts v. Bowman, 70 Ida. 463, 220 P. 2d 682 (1950). It is interesting that the two juries awarded $40,000 and $35,000 respectively, showing, perhaps, that there is a lay sense as to how such matters should be evaluated.

pensation achieves a somewhat more rational form, the award for pain and suffering might be measured and justified in terms of a contribution to the real costs of the litigation.[58]

The implication of these observations is that if our basis of compensating injury is shifted implicitly or explicitly from fault to insurability there must be a reconsideration of the kinds of interest which are compensated and the degree of compensation for the interests which are compensable. It seems likely that, as the goal becomes universal coverage of injury and disease, protection must tend to shrink toward the minimum level of economic loss. I have tried to show that in the absence of willful misconduct it is particularly difficult to justify damages for past discomfort. Impairment of function makes a stronger claim. If we turn to a statutory insurance scheme, workmen's compensation, we find that pain and suffering whether past or future is not compensated except as the existence of pain may produce partial or total disability to earn.[59] Most statutes, however, contain a schedule of specific injuries for which compensation is fixed by statute. Even though the workman is able to resume employment without loss of wages, he recovers the fixed payment.[60] The probabilities, however, are overwhelming that injuries included in the schedule will result in losses of earning power which may not be demonstrable. A man will often be kept on the payroll despite an injury but should the maimed individual have to go elsewhere his disability may be an obstacle. This *is* particularly true of disfigurement which is compensable under many statutes.[61] But the intention of the statutes is carried further and held to cover

[58] *Cf.* MCCORMICK, DAMAGES 277 (1935): "Another substantial argument for exemplary damages in the present American procedural system is that the award of such damages remedies, though crudely and in only a limited class of cases, one of the glaring defects in our system, which is the denial of compensation for actual expenses of litigation, such as counsel fees, to one who has been forced by a wrongdoer to establish by litigation the justice of his claims."

[59] In Cornell-Dubilier Elec. Corp. v. Manocchia, 89 A. 2d 923 (R. I. 1952) the worker contracted a skin disease. It was held that as long as the disease was uncured and the discomfort and embarrassment of working might retard recovery, the worker might remain away from work and recover for temporary total disability. A dictum stated that once cure was effected, embarrassment was not compensable.

[60] Bednar v. Ingersoll Rand Co., 279 N. Y. 80, 17 N. E. 2d 777 (1938) (one quarter loss of hearing in one ear; no loss of earnings shown); Florick v. Broad Window Cleaning Co., 243 N. Y. 576, 154 N. E. 611 (1926); Cameron Coal Co. v. Dunn, 85 Okla. 219, 205 Pac. 503 (1922).

[61] N. Y. WORK. COMP. LAW §15(t) (facial disfigurement; amount discretionary up to $3500); Laws of Mass. c. 152 §361(h) (bodily disfigurement; amount discretionary up to $2500).

N. M. STAT. ANN. 57-918(b) 1941 ". . . If any workman is seriously permanently disfigured about the face or head the court may allow such additional sum . . . as it may deem just." In Elkins v. Lallier, 38 N. M. 316, 32 P. 2d 759 (1934), the claimant lost an eye. The schedule provided 100 weeks' compensation for loss of sight in one eye; 110 weeks for the eye itself. An award for 100 weeks plus $750 for disfigurement was sustained. The same result was reached in Donahue v. Adams Transfer & Storage Co., 230 Mo. App. 215, 88 S. W. 2d 432 (1935).

Some statutes provide that there shall be no compensation for disfigurement, if compensation is payable for any other disability: IND. STAT. ANN. 40-1303(b)(7) (1952). In some recovery may be had if disfigurement constitutes a separate injury. ILL. STAT. ANN. c. 148, §145(c) (1942); S. D. CODE ANN. 64.0403(2) (1939). *See* Chicago Home for the Friendless v. Industrial Comm., 297 Ill. 286, 130 N. E. 756 (1921) (loss of hand and facial disfigurement); *cf.* Smith-Lohr Coal Mining Co. v. Industrial Commission, 291 Ill. 355, 126 N. E. 164 (1920). In Oklahoma both may be had for the same injury. OKLA. STAT. ANN. tit. 85, 922 (1952).

maimings where there is no known rationalization in terms of economic loss. The loss of one testicle has moved the judges to impassioned lyric utterance on the nature of man;[62] it has been held compensable under a statute providing compensation ". . . where the usefulness of the member or any physical function is permanently impaired . . ."[63] or "as an injury known in surgery to be a permanent partial disability"[64] or simply a "disability."[65] In this last case it was held by the board to be 1/10 of total disability and as such worth $800.

It is a fact well publicized that the payments for maiming are much, much less than in a negligence action. It will be remembered that in the *Afflolder* case the plaintiff, a man of 35 earning $400 per month, lost his leg. The Court fixed his loss of earning capacity at 60 per cent. The jury awarded him $95,000 which the judge reduced to $80,000. Under the New York compensation statute which is one of the most liberal he would receive for the loss of a leg 2/3 of his weekly salary for 288 weeks or about $17,280;[66] in Indiana where the injury occurred he would receive $11,000;[67] in Vermont he would receive $4250.[68]

There is then in our system a vast discrepancy between the compensation of an injury depending on whether one is employed by a manufacturer or an interstate railroad; or whether one's injury is work-connected or not. The logic of the situation points to a reduction of this discrepancy. It appears likely that a system which sets the economic loss of a worker at $17,280 will not see fit to allow four times that amount to one suffering a similar loss in an automobile accident. To be sure the negligence requirement, however formal, still does eliminate many claims so that it could be argued that more generous compensation is feasible. But as compensation has become more general the cost of insurance has been mounting rapidly and the present scheme of calculating damages will be on the defensive.[69] Workmen's compensation schemes on the other hand are in many jurisdictions on a

[62] The opinion in Hercules Powder Co. v. Morris County Court, 93 N. J. 193, 107 Atl. 433 (1919) is the best known.

[63] *Ibid.*

[64] Kostida v. Dep't of Labor and Industries, 139 Wash. 629, 247 Pac. 1014 (1926).

[65] Carr v. John W. Rowan Plastering Co., 227 Mo. App. 562, 55 S. W. 2d 723 (1932).

[66] N. Y. WORK. COMP. LAW, §15(3). If there were "temporary total disability" beyond 40 weeks he would receive additional payments, §15(4a), but perhaps not more than $5,000, §15(2).

[67] IND. STAT. §40-1303 (Burns 1952): two hundred weeks times 60 per cent of average weekly salary. In addition he may receive 26 weeks of temporary total disability (60 per cent of average weekly earning), *i.e.*, $1430. Under the New York law he would receive nothing for the first 40 weeks of temporary total disability.

[68] One hundred and seventy weeks times 50 per cent of his average weekly pay but a maximum of $25 per week. He would also receive $25 per week in addition during the period of total disability incident to the loss of the leg whereas under the New York law he would receive nothing for the first 40 weeks of total disability. Thus, he might receive an additional $1,000, VT. STAT. §§8096, 8102 (1947), as amended by Pub. Laws 1949, No. 194.

[69] Material on the point is noted in McNiece and Thornton, *Automobile Accident Prevention and Compensation*, 27 N. Y. U. L. REV. 585, notes 56, 57, and 93 (1952).

It is said that in New York City the cost of insurance is now equal to or greater than the cost of motor fuel. There have been seven increases in the rates since World War II.

In Massachusetts losses have risen from $700,000 in 1946 to $5,000,000 in 1951. The Massachusetts companies claim that they are losing money on this business and they asked for an increase of 22 per cent and were allowed 9.7 per cent.

niggardly basis. Where weekly benefits are tied to weekly earnings the statute adjusts to inflationary movements but a great many of the statutes contain upper limits fixed in dollars which in time become obsolete and are changed only after considerable agitation. Another defect in many of the statutes is an absolute limit on the number of weekly payments in cases of total disability. The railroad unions have opposed the enactment of a compensation scheme in place of the FELA. It is argued that the present schemes of compensation are inadequate and unfair. It is argued that it is unfair to return the railroad workers to the statutes of their respective states with their wide varieties of inadequacy. Abstractly it would not seem unfair that railroad workers be subject to the same law as other workers in their respective states. But undoubtedly many of these statutes are unfair in themselves. Under the circumstances a federal statute generously devised would provide leadership.

In England all persons are now insured against injury and disease. The statute retains, in addition, actions based on negligence even against the injured person's employer, though 50 per cent of the insured benefit can be offset. It has been suggested both in connection with FELA and in automobile accident compensation schemes that as in the English system the negligence concept might be retained as an addition to a compensation scheme. Some have said that then negligence could be administered in a meaningful sense, requiring "real" fault or covering non-typical risks. But in appraising the impact and significance of the double basis in England it must be realized that the insured benefits are at a uniform minimum level taking no account of differences in earning capacity. Benefits for work-connected injuries are higher but even these benefits are modest by our standards; and the insured person must make a weekly contribution.[70] The negligence principle should be retained, of course, to cover non-insurable risks. But it is a more arguable question whether negligence should be retained as a basis for additional compensation. We have shown that negligence as administered today does not signify seriously unsocial conduct. Our experience with degrees of negligence is not such as to lead us to believe that juries can make meaningful distinctions between minimal fault and "real" fault. Furthermore, such recoveries will, of course, be paid by insurance unless insurance for them is outlawed. The question still arises

[70] This scheme is financed by contributions from the insured person, the employer, and the state. National Insurance (Industrial Injuries) Act, 1946, 9 and 10 GEO. 6, c. 62; Family Allowances and National Insurance Act, 1952, 1 ELIZ. 2, c. 29. The weekly injury benefit thereunder (temporary total disability) is 55 shillings (£2 15s). For an injury resulting in disablement the benefit ranges from 11s for 20 per cent to 55s for 100 per cent with an addition of 20s if beneficiary is incapable of work and likely to remain permanently so incapable. To these add 10s. 6d. for a child or the oldest child and 21s. 6d. for a dependent spouse. Thus, if a worker is totally disabled, cannot work at all, and has a wife and child, he would receive, as I figure it, 107s (£5 7s.).

The benefits for non-work connected injuries will be found in National Insurance Act, 1946, 9 and 10 GEO. 6, c. 87. The basic benefit is 26s.

The negligence action is governed by Law Reform (Personal Injuries) Act, 1948, 11 and 12 GEO. 6, c. 41.

See generally Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241, at 253 *et seq.* (1949).

whether our insurance fund should bear these additional charges. Most of the defendants, too, will be corporate and there is little logic in charging them further for the negligence of their employees; it might still be argued that additional recovery should be permitted in cases of willful misconduct, or in cases where top management has failed to follow good engineering practice.[71] The principal function of penalizing fault is, of course, preventive. And there is evidence that policing of the risk by insurers—which takes place without having additional liability for negligence—is a more effective preventive than the threat of liability (which is usually insured anyhow).[72]

A recent writer, Frank Grad, has pointed to the Saskatchewan auto accident compensation scheme as proof of the feasibility of providing a minimal compensation for all injuries while retaining the negligence suit.[73] Under the scheme everyone injured by auto is insured by the state. The premiums are very low.[74] The benefits are modest compared even to our workmen's compensation schemes.[75] The government also writes insurance against liability for negligence. In its first two years there were 6,306 claims, benefits amounted to $1,277,500.[76] Claims were quickly settled. There have been relatively few claims for additional compensation based on negligence. This plan then has worked very well in Saskatchewan. Basically it has probably resulted in a classification of injuries depending on their seriousness. Where the injury is small, the statutory compensation is accepted; where it is large a further claim is made and if one is fortunate enough to have been injured by a careless driver he recovers additional compensation. Such a classification whether logical or not may well promote "customer satisfaction."

Mr. Grad believes that the Saskatchewan experience has proved the general worth of the scheme. But at least certain questions arise as to its transferability to a jurisdiction such as New York. We would have to know the comparative accident rates. Saskatchewan is a rural, New York a dense metropolitan area. It will be noted, too, that the average recovery in Saskatchewan was $200 per claim. Writers on this subject tend to overlook the fact that Americans think in comparatively extravagant terms. Our recoveries are amazingly large compared to those in other countries, justified up to a point, of course, by our greater wealth. Our recent writers and courts encourage, as we have seen, the disposition of juries to think in

[71] In Germany the employer is held only for willful misconduct, in Austria for gross negligence. See Lenhoff, *Social Insurance Replacing Workmen's Compensation*, 5 NACCA L. J. 49, 54 (1950).

Suggestions for limiting liability in the English scheme to gross negligence were rejected. *Friedmann*, *supra* note 70, at 257. Degrees of negligence are apparently not popular with English lawyers. The English judges have said that "gross negligence is ordinary negligence with a vituperative epithet . . ." See Grill v. General Iron Screw Collier Co., L. R. 1 C. P. 600 (1866) printed in SEAVEY AND KEETON'S CASES ON TORTS.

[72] See James, *supra* note 1, at 557.

[73] Grad, *Recent Developments in Automobile Accident Compensation*, 50 COL. L. REV. 300 (1950).

[74] The fund is provided by premiums on autos of $4.50 to $10.00 per year.

[75] Death benefits at $3000 for a primary dependent, and for all dependents a maximum of $10,000.
Permanent total disability—a maximum of $20 per week until $2400 has been received.
Temporary total disability—a maximum of $20 per week up to 52 weeks.

[76] See Grad, *supra* note 73, at 323.

generous terms. Our people grow increasingly "claim-conscious." This means not only that they press a claim when they have one. It means also that they have ample ideas of the magnitude of their injury and, further, that they are more imaginative in the attribution of their ailments to the conduct of insured persons. The concept of "insurability" expands the horizons of plaintiffs and juries. The ethical sense—or the sense of caution—becomes somewhat dulled in the presence of an impersonal insurance fund. This is, perhaps, one of the general problems of a "security state."

Writers recognize these facts but usually do no more than make a few pious caveats before ignoring them in their conclusion. The courts, it is said, have the power and perspicacity to expose fraud; they will demand adequate cogent evidence; they will curb the excesses of juries. But once rules of law concerning the elements of liability are established these asserted defenses against "abuse" are speedily forgotten. The current cliches about the sphere of the jury are ill-adapted to the task of curbing it; they express, furthermore, the general uncertainty as to what principles should prevail in this area. Even some of the judges, when they sit as triers of fact, think and feel as would the jury or seek to adopt its attitudes.

In a recent article McNiece and Thornton sum up many of the factors in the current situation: the high "claims consciousness" of New Yorkers,[77] the tremendous increase in insurance rates. They are aware also of the great abuses of compensating psychic injury—the opportunity for simulation and (more common) attribution of preexisting neuroses to the defendant's conduct.[78] Yet withal they impliedly advocate the abolition of the negligence requirement without dealing in any positive fashion with the mounting cost of insurance. They reject, for example, any notion of a schedule of fixed recoveries:[79]

[77] See notes 2 and 69, *supra*. Dickerson in his *Products Liability and the Food Consumer* (1951) at 249 offers evidence that out of 38,000 claims against insurers for food liability 67 per cent were from the New York Metropolitan area, 12½ from Boston, and the remainder spread around the country!

In a recent year the "X" grocery chain paid $14,000 claims in New York, $81,000 in Boston, $1,500 in Chicago, and none in Los Angeles. The same chain with 50 stores in Philadelphia had paid one claim in 9 years.

[78] Professor McNiece has treated very well the problems involved in compensation of psychic injury in his article, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHNS L. REV. 1 (1949). He distinguishes between normal and idiosyncratic responses to stimuli and would allow very little recovery for the latter. *Id.* at 76. He notes, however, that verdicts allow somewhere around $9,000 for psychic diseases of either sort, laymen having been much oversold on the liability of the ordinary man to traumatic psychosis. *Id.* at 77, note 254.

I would agree with Professor McNiece though his position in some measure rejects the usual view that you "take the plaintiff as he is." See for example, Owen v. Rochester-Penfield Bus Co., New York Court of Appeals, Oct. 24, 1952.

Professor McNiece says further, "Dangers of fabrication of evidence where they exist can be effectively combated by demanding clear and cogent evidence according to the best medical standards available." *Id.* at 81. Apropos of this suggestion, the Supreme Court in New York City has recently approved the establishment of a panel of physicians to examine plaintiffs in cases where the evidence is conflicting. The expert will be subject to call at the trial. This, said Judge Peck, should have a "psychological and prophylactic effect." N. Y. Times, Nov. 24, 1952, p. 1. It remains to be seen how such evidence will affect the attitude of the jury. Perhaps, however, as insurance rates mount juries will be more discriminating.

[79] 26 ST. JOHNS L. REV. at 274.

. . . the courts, trained as they are in dealing with the facts and equities of particular cases and having broad latitude in awarding damages, can more justly determine accident cases. . . .

It would seem to me that at least in industrial accidents we should retain our present scheme of compensation without the addition of a negligence suit against the employer. It is better to put the money into more generous compensation payments than into a capricious dividend based on the manner in which one's fellow servant happened to contribute to the injury. The automobile accident situation is more difficult and this not the place to explore it. We could perhaps profit from experimentation. We might try a very modest payment to everyone injured and retain the negligence suit but with certain of its excrescences lopped off. It is more difficult to police the automobile risk than the industrial accident risk. If to a certain extent the driver's concern for his own safety may induce care, this concern may operate with least effect on the "accident-prone" driver who is the greatest menace. And so perhaps we should, as a further incentive, retain the risk of increased recovery for negligence. But if we permit the driver to insure the whole risk, we do not achieve our objective. We might conclude that the negligent driver should in every case be required to pay part of the loss if he wishes to retain his license. In any case, we should reduce the problem to its essential terms which are (a) the prevention of injury and (b) compensation for such harms and in such measure as the common insurance fund can be fairly asked to provide.

AN INTERPRETATION OF THE ACT OF 1939 (FELA) TO SAVE SOME REMEDIES FOR COMPENSATION CLAIMANTS

VERNON X. MILLER*

In recent years the story of FELA has been told often.[1] It is not necessary to repeat much of it here except by way of summary. For 1906 and 1908 the Federal Employers' Liability Act was a remedial scheme.[2] Understandably in those years lawmen looked skeptically at social legislation. The dead hand of a pre-industrial society was being pulled from the eighteenth century through the Fourteenth Amendment to choke state welfare programs.[3] Some lawyers in 1908 were prepared to argue that judge-made concepts like fellow-servant, contributory negligence, and fault are comparable to dogmatic truths.[4] Nevertheless, when the chips were down, even a tough constitutionalist like Van Devanter was not convinced.[5] He remembered Waite's epigram that there is no vested interest in a rule of law.[6]

It was a unanimous Court, speaking through Van Devanter, that approved the second Federal Employers' Liability Act. The statute was a regulation of commerce within the delegated powers of Congress, the Court said, and the scheme of it was consistent with due process, although Congress had dared to touch contributory negligence and fellow-servant and to regulate the employment relations between interstate railroads and their workmen. In the Second Act of 1908 Congress respected

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[1] See the symposium in a recent volume of the *Cornell Law Quarterly*. Pollack, *Workmen's Compensation for Railroad Work Injuries and Diseases*, 36 CORNELL L. Q. 236 (1951); Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L. Q. 203 (1951). See also Delisi, *Federal Employers Liability Act—Scope and Recent Developments*, 18 MISS. L. J. 206 (1947); Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV. 138 (1944). The most important publication in the field is the Survey of the United States Railroad Retirement Board published in 1947, WORK INJURIES IN THE RAILROAD INDUSTRY 1938-1940, in two volumes [hereinafter referred to as RRB SURVEY].

[2] The First Federal Employers' Liability Act was approved on June 11, 1906. 34 STAT. 232. The Supreme Court decided that the first statute was unconstitutional. The criticism was special and it is discussed below in the text. *See* The Employers' Liability Cases, 207 U. S. 463 (1908). The Second Act was approved on April 22, 1908. 35 STAT. 65. *See* 45 U. S. C. §51 *et seq.* (1946).

[3] It is a big order to cite cases for this proposition. You think of Mr. Justice Field and freedom of contract and you think of lawyer Campbell after he retired from the bench and his arguments on privileges and immunities and due process. Perhaps the one case that illustrates best the figure of speech in this proposition is Lochner v. New York (198 U. S. 45) decided in 1905.

[4] See the arguments of the railroads' counsel summarized in the report of the *First Cases*. 207 U. S. at 484-485. See the argument of John H. Hall for the railroads in the *Second Cases*, 223 U. S. at 41.

[5] The Second Act was approved by the Supreme Court in 1912. Second Employers' Liability Cases, 223 U. S. 1 (1912).

[6] *See* Van Devanter, J., in 223 U. S. at 50; *cf.* Waite, C. J., in Munn v. Illinois, 94 U. S. 113, 134 (1876).

the Supreme Court's judgment;[7] the regulating of employment was restricted to instances occurring in interstate commerce. But Congress did not dare to touch the fault concept in the First Act of 1906 or in the Second Act in 1908, nor has Congress dared to touch it up to now. Although there are many other chapters in this story, that one is vital; work injury claims in the railroad business are adjusted like other torts.

Many lawmen in 1953 will describe any such program for settling work injuries as obsolete. They think workmen's compensation is a better system, and they think also that they have the experiences of forty years to corroborate their opinions. Now these lawmen are told that compensation is a costly scheme, that administrative expenses are high, that awards are inadequate, and that there is quantity litigation developing from questioned claims.[8] Facts and figures are produced to show that railroad men on the average and railroad employers on the average are better off under the remedial tort scheme of the Federal Act than they would be under compensation schemes in comparable areas. It is argued from the data in these compilations that lawyers' costs are greater under compensation programs, that settlements are easier under the Federal Act, and that the costs to carriers under it are relatively moderate. But some lawmen are skeptical of figures. Even in simple cases, they think the fault standard is an artificial one. They are not sure that fault can ever be an adequate measure of a person's social responsibilities in the intricate society of the mid-twentieth century. About FELA they know the story is a special one, that percentagewise more plaintiffs will get judgments in these cases than in the ordinary lawsuits for simple torts. But they know also that all plaintiffs do not win even under this statute and that big verdicts and judgments are not always good for everyone. Perhaps big judgments are not too large for plaintiffs' needs and lawyers' work,[9] but they can drain the resources of defendants who must pay the judgments. There is a law of diminishing returns; the employment relation cannot be charged with all the social costs of work hurts.

Although the fault concept is vital in the story of FELA, it is not the only important chapter. How the Court in the early days limited the special statutory scheme to cases affecting transportation or something so closely connected with it as to be practically a part thereof is a chapter in the story that delights legalistic lawmen.[10] That tight transportation test was a common-law lawyer's kind of device to stimulate appeals and spark litigation. It was pinpointed, as the New York courts describe it, to the occasion of the injury.[11] How the Court developed the

[7] See the decision on the First Act. The Employers' Liability Cases, 207 U. S. 463 (1908), discussed in the text.

[8] See the pilot study prepared by authorization of the Graduate College, University of Illinois, under the direction of Professors Alfred F. Conard and Robert I. Mehr: COSTS OF ADMINISTERING REPARATION FOR WORK INJURIES IN ILLINOIS (1952). See also Conard, *Workmen's Compensation: Is It More Efficient than Employer's Liability?*, 38 A. B. A. J. 1011 (1952). *Cf.* Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workmen*, 36 CORNELL L. Q. 203 (1951).

[9] See Editorial, 5 NACCA L. J. 11 (1950); Note, 4 *id.* at 280-310 (1949).

[10] Shanks v. Delaware, Lack. & West. R. R., 239 U. S. 556 (1916).

[11] *See* Desmond, J., in Baird v. New York Central R. R., 299 N. Y. 213, 216, 86 N. E. 2d 567, 568 (1949).

distinction between assumption of risk and contributory negligence so that one was an absolute defense in spite of the statutory text and the other sufficient only to affect the quantity of compensation is another chapter to intrigue the lawyer with little taste for sociology.[12] How all of this was developed by the Court while state compensation programs were expanding to absorb some of the left-overs, even among railroad workmen,[13] is a chapter the legalists would like to overlook were it not for *New York Central Railroad v. Winfield*.[14] The lawyers' Court that developed the transportation test and the fine distinction between contributory negligence and assumption of risk declared in *Winfield* that they would protect the regulatory scheme for railroad workmen against state compensation. The Act of Congress was exclusive whenever a claim could be litigated under the Federal Act. That was the Court's interpretation although Congress had not prescribed so by specific text. Nevertheless, as the courts weeded out[15] more cases from the Federal Act through the transportation and pinpoint tests, a few more cases fell to workmen's compensation until Congress plugged the leak in 1939.[16]

Did Congress try to reduce the compensation area in 1939? If you count noses among judges the score is lopsided.[17] Because the federal scheme can be exclusive if Congress wants to make it so, and because the Court said in the *Winfield* case that Congress must have so intended, almost all of the men who have sat in judgment have said that Congress tried to plug the leak. The Illinois Supreme Court has held otherwise.[18] Some other judges have agreed with the Illinois court, notably

[12] *See* Toledo, St. L. & W. R. R. v. Allen, 276 U. S. 165 (1928); Delaware, Lack., & West. R. R. v. Koske, 279 U. S. 7 (1929). In these cases the Supreme Court confirmed the case law of the lower courts. In the *Koske* case Mr. Justice Butler said (p. 11): "Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters or leave engineering questions such as are involved in the construction and maintenance of railroad yards and the drainage system therein to the uncertain and varying judgment of juries!"

[13] See Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV. 138, 152 (1944).

[14] 244 U. S. 147 (1917). There is another *Winfield* case published in the same volume. The plaintiffs are not the same Winfields and the events in the two cases are not related. *See* Erie R. R. v. Winfield, 244 U. S. 170 (1917).

[15] In 1910 Congress provided specially that state and federal courts should have concurrent jurisdiction in these cases. 36 STAT. 291, as amended in 1948, 62 STAT. 989. See 45 U. S. C. §56. In effect the plaintiffs may choose the courts for trial. State legislatures have tried to reduce the trying of cases affecting non-residents and out-of-state events in local courts. *See* Baltimore & Ohio R. R. v. Kepner, 314 U. S. 44 (1941). This kind of legislation can be supported now if it is effective against all non-residents including those who are domiciled in the local state. Missouri v. Mayfield, 340 U. S. 1 (1950).

[16] See Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV. 138, 152-153 (1944); RRB SURVEY 8, 28.

[17] The list of cases in which compensation was denied is long. Kettner v. Industrial Comm., 258 Wis. 615, 46 N. W. 2d 833 (1951); Bowers v. Wabash R. R., 246 S. W. 2d 535 (Mo. App. 1952); Baird v. New York Central R. R., 299 N. Y. 213, 86 N. E. 2d 567 (1949); Trucco v. Erie R. R., 353 Pa. 320, 45 A. 2d 20 (1946), *confirming the decision in* Scarborough v. Pennsylvania R. R., 154 Pa. Super. 129, 35 A. 2d 603 (1944); Albright v. Pennsylvania R. R., 193 Md. 421, 37 A. 2d 870 (1944); Prader v. Pennsylvania R. R., 113 Ind. App. 518, 49 N. E. 2d 387 (1943); Southern Pac. Co. v. Industrial Acc. Comm., 19 Cal. 2d 271, 120 P. 2d 880 (1942); Piggue v. Baldwin, 154 Kan. 708, 121 P. 2d 183 (1942); Louisville & N. R. R. v. Potts, 178 Tenn. 425, 158 S. W. 2d 729 (1942).

[18] Thomson v. Industrial Commission, 380 Ill. 386, 44 N. E. 2d 19 (1942), discussed in 2 LOYOLA L. REV. 93 (1943).

some of the judges in the appellate divisions in New York[19] and the judges of the Supreme Court of Idaho,[20] but the Court of Appeals in New York has added its weight to the majority side,[21] and the judges in Idaho depended much on case law from the old regime.[22] The judges of the Supreme Court in South Carolina will be on the Illinois side when the right case comes along, because they have said already that Congress has not foreclosed the deciding of some railroad cases under a state employers' liability act.[23] Perhaps it is significant that the Supreme Court has refused to commit itself, although it has supervised carefully the administering of the statute as amended in every other area. Perhaps it is significant also that *Winfield* was decided in 1917.

The year 1939 was a milestone in the story of the Federal Act. The statute was amended,[24] the rigid transportation test for interstate commerce was rejected, and assumption of risk was classified with contributory negligence. Interstate commerce was expanded to include more than transportation, and the scheme of the statute was extended to cover work injuries happening to anyone, any part of whose duties are in furtherance of such commerce. The old distinctions in the case-law results had seemed artificial to many lawyers.[25] From the story of the litigation in the years before 1939, from the discussions in the houses of Congress, and from the text of the statute as amended, one deduction seems obvious. Congress was trying to cure a bad situation. Congress was trying to rescue the Court from legalisms that were sterile. The transportation test was devised by the Court within a few years after the date of the adverse decision on the first Federal Act.[26] Under the commerce clause the Court had said in that first case that Congress could regulate only those injuries that were suffered by railroad men who were engaged in interstate commerce when they were hurt.[27] If that premise is true, the pinpoint test for transportation does have meaning. However, during the years between 1908 and 1939 the Court in other

[19] *See* Heffernan, J., dissenting in Wright v. New York Central R. R., 263 App. Div. 461, 462, 33 N. Y. S. 2d 531, 532 (3d Dep't 1942); Baird v. New York Central R. R., 274 App. Div. 577, 86 N. Y. S. 2d 54 (3d Dep't 1948).

[20] Moser v. Union Pac. R. R., 65 Ida. 479, 147 P. 2d 336 (1944).

[21] Baird v. New York Central R. R., 299 N. Y. 213, 86 N. E. 2d 567 (1949), *reversing* Baird v. New York Central R. R., 274 App. Div. 577, 86 N. Y. S. 2d 54 (3d Dep't 1948).

[22] The Idaho court was willing to sacrifice some of the new statutory program to save a little bit of workmen's compensation. The injured man was working on a new construction project. Under the transportation test of the older case law that was not interstate commerce. *Cf.* New York Central R. R. v. White, 243 U. S. 188 (1917) (the first compensation case). It has been argued and decided that this kind of work does pertain to the furtherance of commerce under the new definition. Agostino v. Pennsylvania R. R., 50 F. Supp. 726 (E. D. N. Y. 1943); *cf.* Note, 153 A. L. R. 357 (1944). The Idaho workman did not have a case for tort. After suffering a severe pain in his back he had collapsed on the job and he was injured as he fell. It was a typical compensation case under the old case law which the court relied on here without considering how the decision might affect the case of another workman injured on a job like this where he might have a cause of action for fault.

[23] Boyleston v. Southern Ry., 211 S. C. 232, 44 S. E. 2d 537 (1947).

[24] Act of August 11, 1939, 53 STAT. 1404; 45 U. S. C. §51 *et seq.* (1946).

[25] See *Hearings before a Subcommittee of the Senate Judiciary Committee on S. 1708 (Amending the FELA)*, 76th Cong., 1st Sess. (1939). The general counsel of the American Association of Railroads agreed with the general counsel for the Brotherhood of Railroad Trainmen. See particularly, *id.* at 24-25.

[26] Shanks v. Delaware, Lack. & West. R. R., 239 U. S. 556 (1916).

[27] The Employers' Liability Cases, 207 U. S. 463 (1908).

cases touching other fields had gone far to agree with Congress that regulatory powers over commerce are great enough to affect not only the carrying and selling of goods in commerce but even the steps preliminary to the production of goods for interstate commerce.[28] There is little if anything in the history of previous litigation, in the floor discussion, or in the text of the statute to support a deduction that Congress was trying to close a gap and to shut off all other possible remedies, unless it is found in the *Winfield* case and the silence of Congress.

The other big remedial change of 1939 affected assumption of risk. Distinguishing between a plaintiff's assuming the risk of injury and contributing to his hurt through his own misconduct often is a matter of literal explanation. The case law in this area before 1939 was difficult to accept,[29] and Congress abolished the distinction. Obviously Congress was not trying to close a gap with this proposal. Many persons who would have been barred under the old defense have been successful as plaintiffs because of this change in the statute,[30] and the Court has been careful to protect these plaintiffs against a new kind of playing with the old defense. It is not a risk of railroading which a workman must accept, when a condition exists that the company can reduce.[31] Proof of that condition is enough to support a plaintiff's prima facie case of fault.[32]

Most of what has happened since 1939 has been good. The old statute was inadequate and the case-law distinctions were artificial. The Act of 1939 was good social legislation, and the courts have been generous in appraising the new standards.[33] There has been some lawyer criticism of the newer case-law trends, as if

[28] The Wagner Act: 49 STAT. 449 (1938); Labor Board v. Jones & Laughlin, 301 U. S. 1, 34 (1937); Santa Cruz Co. v. Labor Board, 303 U. S. 453 (1938). The Fair Labor Standards Act: 52 STAT. 1060 (1938); United States v. Darby, 312 U. S. 100 (1941); Kirschbaum Co. v. Walling, 316 U. S. 517 (1942). The decisions under the Fair Labor Standards Act were effected after 1939 but the statute was enacted in 1938 and the favorable opinions of 1941 and 1942 were generated in the case law of 1937 and 1938.

[29] See the cases cited in note 12, *supra*. *See* Snow v. Texas & P. Ry., 166 So. 200 (La. App. 1936). The decedent's dependents were denied relief although some of the dead man's colleagues were tortfeasors. The decedent knew he could not swim when he stepped onto an unstable raft in a pond of water.

[30] *See* Wilkerson v. McCarthy, 336 U. S. 53 (1948); Sadowski v. Long Island R. R., 292 N. Y. 448, 55 N. E. 2d 497 (1944).

[31] Tiller v. Atlantic Coast Line R. R., 318 U. S. 54 (1943). The plaintiff in the *Tiller* case had to wait long to get justice in the end. *See* Tiller v. Atlantic Coast Line R. R., 323 U. S. 574 (1945). Again the court of appeals was reversed, but this time a jury had found a verdict for the plaintiff and the case was remanded for judgment to be entered on the verdict.

[32] *Cf.* Fleming v. Kellett, 167 F. 2d 265 (10th Cir. 1948).

[33] We are thinking here of cases like *Tiller* on assumption of risk and of those cases in both state and federal courts where the judges have tried to reach with Congress for an expansive concept of interstate commerce. When the injured workman can build on fault, this generous interpretation produces good results. *Cf.* Edwards v. Baltimore & O. R. R., 131 F. 2d 366 (7th Cir. 1942); Erwin v. Pennsylvania R. R., 36 F. Supp. 936 (E. D. N. Y. 1941); Maxies v. Gulf, M. & O. R. R., 358 Mo. 1190, 219 S. W. 2d 322, 10 A. L. R. 2d 1273 (1949); Atlantic Coast Line R. R. v. Meeks, 30 Tenn. App. 520, 208 S. W. 2d 355 (1947); Missouri Pac. R. R. v. Fisher, 206 Ark. 705, 177 S. W. 2d 725 (1944). Perhaps all of the plaintiffs would have been denied relief in actions under the statute before 1939 because when they were hurt they were not engaged in interstate commerce, as it was defined in the *Shanks* case. However before 1939, persons like these plaintiffs could have qualified as claimants for state compensation. Unless the old compensation benefits have been preserved, men like these would be without relief today if they could not win on fault.

the results indicate now that there is an absolute liability under this statute without the standardizing of compensation that is attendant usually with an absolute liability program.[34] These critics protest too much. It is true, as we have seen, that the courts have protected railroad workmen against a new kind of assumption-of-risk defense. It is true also that there are decisions like *Tennant v. Peoria & Pekin Union Railroad*[35] and *Bailey v. Central of Vermont Railway*[36] where the evidence was circumstantial or the omissions very slight.[37] Perhaps the catalogue of cases where juries find on negligence against plaintiffs in these actions is not large, but there are such cases,[38] and the list is long where courts have dismissed complaints or directed verdicts for defendants when the evidence of negligence was not enough.[39] The *Tennant* case and the *Bailey* case point to possibilities for circumstantial evidence that the Supreme Court in the 1920's might have appraised as insufficient.[40] The Court has become more jury conscious on contributory negligence; comparisons of fault are for the jury only to adjudge.[41] Nevertheless, FELA smacks of tort liability. Findings must depend on facts even where the inferences suggest nonfeasances.[42]

[34] *See* Black, J., in Wilkerson v. McCarthy, 336 U. S. 53, 61-62 (1949).

[35] 321 U. S. 29 (1944).

[36] 319 U. S. 350 (1943).

[37] *Cf.* the following cases from state courts: Hayes v. Wabash R. R., 360 Mo. 1223, 233 S. W. 2d 12 (1950); Williams v. New York Central R. R., 402 Ill. 494, 84 N. E. 2d 399 (1949); Sadowski v. Long Island R. R., 292 N. Y. 448, 55 N. E. 2d 497 (1944). *See* Biggs, J., in Jacobs v. Reading Co., 130 F. 2d 612, 613 (3d Cir. 1942). Judge Biggs refers to the special standards for negligence in the case law under the Federal Act.

[38] Tracy v. Terminal Ass'n, 170 F. 2d 635 (8th Cir. 1948); Kraus v. Reading Co., 167 F. 2d 313 (3d Cir. 1948); Roberts v. United Fisheries Co., 141 F. 2d 288 (1st Cir. 1944), *cert. denied*, 323 U. S. 753 (1944). The last case was tried under the Jones Act but the standards for negligence under that statute are comparable with those under FELA.

[39] Atlantic Coast Line R. R. v. Craven, 185 F. 2d 176 (4th Cir. 1950) (brakeman encumbered with lantern and lunchbox injured when he tried to crawl over a gondola car in a moving train); Mastrandrea v. Pennsylvania R. R., 132 F. 2d 318 (3d Cir. 1942) (crossing watchman killed when trying to prevent children's crossing intersection); Southern Ry. v. Mays, 192 Va. 68, 63 S. E. 2d 720 (1951) (section hand on special duty as watchman killed while crossing in front of train); Camp v. Southern Ry. 232 N. C. 487, 61 S. E. 2d 358 (1950) (section foreman injured as he slipped and fell while trying to climb into a freight car through an open door); Cowdrick v. Pennsylvania R. R., 132 N. J. L. 131, 39 A. 2d 98 (1944), *cert. denied*, 323 U. S. 799 (1945) (bridge tender fell from shanty with no eyewitnesses); Cunningham v. Great Northern Ry., 73 N. Dak. 315, 14 N. W. 2d 753 (1944) (telegraph lineman struck down in a speeder on main track by passenger train when there was no evidence that train was not on schedule); Osment v. Pitcairn, 349 Mo. 137, 159 S. W. 2d 666 (1942), *cert. denied*, 317 U. S. 587 (1942), 320 U. S. 792 (1943) (switching crewman disabled by fellow employee in horseplay when there was no evidence to suggest that fellow servant's conduct could have been expected). This is just part of the list but these are sufficient to indicate that the absolute liability criticism is an over-statement.

[40] Chicago M. & St. P. Ry. v. Coogan, 271 U. S. 472 (1926). Nevertheless even today there must be something in the circumstantial evidence sufficient to support a finding that relates the injury to fault. *Cf.* Cowdrick v. Pennsylvania R. R., 132 N. J. L. 131, 39 A. 2d 98 (1944), *cert. denied*, 323 U. S. 799 (1945).

[41] *Wilkerson v. McCarthy* is the classic case of recent years. 335 U. S. 53 (1949). *See also* Urie v. Thompson, 337 U. S. 196 (1949); Terminal R. R. Ass'n of St. Louis v. Scharb, 151 F. 2d 361 (8th Cir. 1945). *But see* Southern Ry. v. Mays [192 Va. 68, 63 S. E. 2d 720 (1951)] where the state court offered as one reason for reversing the judgment on a verdict for the plaintiff that the accident was caused by the plaintiff's foolhardiness.

[42] In the *Tennant* case there was evidence that the trainman had not rung a warning bell. *Cf.* Malone v. Gardner, 242 S. W. 2d 516 (Mo. 1951) (where decedent fell from switch engine when no one was looking and where it was evident that the engine could have been equipped to reduce danger

Although the courts have been generous in appraising the new statute and applying its standards to produce more judgments for successful plaintiffs, they have stubbed their toes in one small area. It is understandable but unfortunate that in the area of workmen's compensation judges have let the *Winfield* case spoil the remedial effects of the 1939 amendments. The *Winfield* case must be studied in its setting. Several important compensation cases were decided by the Supreme Court during the 1916 Term, and *Winfield* was a compensation case. The first cases on the constitutionality of workmen's compensation, *Southern Pacific Company v. Jensen*,[43] and the *Winfield* case were decided in that term. The compulsory compensation statute of New York, the Court said, was constitutional,[44] the voluntary pressure program of Iowa was good,[45] and so was the compulsory class insurance compensation scheme of Washington.[46] But the Court said in the *Jensen* case that a state compensation program could not be devised for longshoremen, and in *Winfield* that a state program could not be extended to cover railroad workmen who were engaged in interstate commerce when they were hurt. Because there was no case for fault, the workman in *Winfield* was without a remedy although he lost the sight of an eye while he was on the job. Most of the sting has been removed from *Jensen*. There is a federal compensation act now for longshoremen and harbor workers,[47] and the difficulties in allocating the right man to the right program, federal or state, where there is the possibility of doubt, have been resolved by the Court in *Davis v. Department of Labor*.[48] The decision of any agency, federal or state, on classification in the overlapping area, the Court said, will be taken as conclusive. But *Winfield* looms larger now than before 1939. Perhaps it is worth remembering that the New York Court of Appeals was reversed in *Winfield* and that a powerful dissent was written by Mr. Justice Brandeis.

It is worth repeating that the effects of *Winfield* were not all bad before 1939.[49] The Court had decided that the regulating of railroad workmen under the Federal Act was exclusive in its area. Congress had no reason to prescribe so expressly in 1908 because state compensation laws were not then on the statute books. With its decision in the *Winfield* case and its tight transportation test, the Court was building a relatively restricted area within which the Federal Act could be exclusive. Percentagewise the effect was not great, but in specific instances the results were important. If a railroad workman was not covered under the Federal Act because

to persons who had to stand across the boiler top); Anderson v. Atchison, T. & S. F. Ry., 31 Cal. 2d 117, 187 P. 2d 729 (1947), *rev'd*, 333 U. S. 821 (1947) (company obliged to search for a conductor reported missing).

[43] 244 U. S. 205 (1917).

[44] New York Central R. R. v. White, 243 U. S. 188 (1917).

[45] Hawkins v. Bleakly, 243 U. S. 210 (1917).

[46] Mountain Timber Co. v. Washington, 243 U. S. 219 (1917) (four judges dissenting without opinions after counsel had attacked the state-administered insurance scheme).

[47] Enacted in 1927. 44 STAT. 1424. *See* 33 U. S. C. §901 *et seq.* (1946).

[48] 314 U. S. 244 (1941).

[49] See Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV. 138, 152 (1944). Compare the discussion in footnote 22 *supra*.

of the transportation test and the pinpoint rule, he could be covered under a state program. In some instances the legislatures had set up state liability programs for railroad workers, and under some local compensation statutes railroad employees were excluded expressly from the compensation scheme.[50] Nevertheless in a substantial number of states some injured railroad workmen could get compensation benefits.[51] With instances of cases like *Chicago & Northwestern Railway v. Bolle*[52] added to the picture, some cases were falling to the compensation programs.

It is the principal thesis of this paper that there is no reason to conclude that Congress tried to affect the compensation area in 1939 or to extend the doctrine of the *Winfield* case. The scope of the statute now is so comprehensive that there are few railroad employees who are not covered by it.[53] If any employee does anything as a part of his daily routine pertaining to interstate commerce under the expanded definition, he can process his case under the federal statute no matter what he was doing when he was hurt. Of course his injury must have been derived from something incidental to his job.[54] The word "can" is the nub of the proposition. If he "can" process his case, does it follow necessarily that he "must" do it? That is what the great majority of judges have said, and they charge their conclusions to the theme of the *Winfield* case.[55] We do not propose here to examine all the criticisms against FELA and workmen's compensation, or to consider the kinds of remedial programs that have been offered as substitutes for the federal scheme.[56] We are supposing for our problem that we must work with case law

[50] See the tabulation in the *Railroad Retirement Board Survey* on page 28.

[51] You think of the states where you have lived. In Minnesota there was a state employers' liability act, with its remedial tort scheme for railroad workers comparable to the program of the Federal Act. *See* Minn. Laws 1915, c. 187, as amended, Minn. Laws 1923, c. 133, Minn. Laws 1951 c. 51; *cf.* MINN. STAT. 1949 §§219.77-219.83. In Louisiana railroaders could be covered under state compensation. *See* Fluitt v. New Orleans T. M. Ry., 187 La. 87, 74 So. 163 (1937). It was so in Wisconsin [*cf.* Kettner v. Industrial Comm. 258 Wis. 615, 46 N. W. 2d 833 (1951)] and in California [*cf.* McKinney v. Industrial Acc. Comm., 137 Cal. App. 206, 30 P. 2d 78 (1934)].

[52] 284 U. S. 74 (1931). The plaintiff lost a case where the record was sufficient for fault. When he was hurt he was not engaged in transportation or something so closely related to it as to be within the definition of the *Shanks* case. Under the Illinois case law he could have processed a claim for compensation. By the time that final judgment was entered against him in the tort case, it could have been too late for him to ask for compensation. The Supreme Court has been generous about the tolling of the statutory limitations in the Federal Act when a plaintiff has asked first for compensation. *See* McCabe v. Boston Terminal Co., 309 U. S. 624 (1940), *reversing*, 303 Mass. 450, 22 N. E. 2d 33 (1939).

[53] Some of the judges who have wanted to save some of the old area of compensation have been willing to sacrifice part of the remedial scheme of 1939. *Cf.* Baird v. New York Cent. R. R., 274 App. Div. 577, 86 N. Y. S. 2d 54 (3d Dep't 1948), *rev'd*, 299 N. Y. 213, 86 N. E. 2d 567 (1949). There the court tried to save a compensation claim by effecting a tight interpretation of the newer definition of interstate commerce. It has been obvious to most judges that Congress intended the definition to be administered generously. The Idaho court tried to save a compensation case by agreeing with the older cases that work on a new construction job was not in furtherance of interstate commerce. Moser v. Union Pac. R. R., 65 Ida. 479, 147 P. 2d 336 (1944) discussed in note 20, *supra*. If the courts can save some of the compensation benefits from the old regime, they must do it with some other kind of interpretation scheme.

[54] This is hornbook law that is basic under any kind of work-injury program. *Cf.* Erie R. R. v. Winfield, 244 U. S. 170 (1917).

[55] See the cases cited in note 17, *supra*.

[56] See the Resolution enacted in the House of Delegates of the American Bar Association at St. Louis in 1949. 74 A. B. A. REP. 108 (1949). *Cf.* RRB SURVEY cc. 10, 11, 12; Pollack, *Workmen's*

and with old-fashioned lawyer techniques on statutory interpretation, distinctions, and analyses. It is a small percentage kind of job at best, and it is not an adequate substitute for a comprehensive reappraisal, but it is important as a preliminary inquiry. Although the case quantity seems minute, the problem has been important to individuals in many instances. Some lawmen are not ready yet to resolve even small inequities by the law of averages.

Certainly we must reckon with the *Winfield* case and the power which Congress has to do exactly what the Court discovered in 1917. But we are working in the area of statutory construction, and in that area we do not follow precedent blindly or forever.[57] It is true that there have been many opportunities for Congress to attack the theme of *Winfield* either to clinch it, to disavow it, or to afford to state agencies some choice about it. By precise text Congress has not effected any change. Nevertheless, the whole scheme of the 1939 revision is remedial in plan. If we are so impressed by time and silence in our approach to the *Winfield* case as to conclude that it is one which the Court cannot now disregard, it is arguable that the Court can tie *Winfield* to the case law of the old era. The few instances that may slip through to workmen's compensation will not be many, nor will the totality of compensation awards be much in dollars and cents, but an award in compensation can mean much to a claimant like the workman in *Southern Pacific Company v. Industrial Accident Commission*,[58] a California case. The claimant was a car repairman who was trying to remove an iron hinge from the door of a work car, when he was hurt. In pulling and tugging at the hinge he disengaged a sliver of metal which struck him in the eye, and he lost the sight of the eye. To attempt to solve this kind of case with fault, safe-place, and inadequate-tool doctrines smacks of ritual and incantation. It is enough to say that the man in the California case was without a remedy because the court was *Winfield* conscious, although a workman like the injured claimant would have been entitled to compensation in California before 1939.[59] There are other cases like it, enough of them that lawyers

Compensation for Railroad Work Injuries and Diseases, 36 CORNELL L. Q. 236, 271 (1951); Richter and Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L. Q. 203, 205 (1951); Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV. 138, 161-162 (1944).

[57] Even in the highest English Court, the Lords recognize that they are not bound by precedent on statutory interpretation. *Cf.* Harris v. Associated Portland Cement Manufacturers, [1939] A. C. 71.

[58] Southern Pac. Co. v. Industrial Acc. Comm., 19 Cal. 2d 271, 120 P. 2d 880 (1942).

[59] *See* McKinney v. Industrial Acc. Comm., 137 Cal. App. 206, 30 P. 2d 78 (1934). *But cf.* Northwestern Pac. R. R. v. Industrial Acc. Comm., 73 Cal. App. 2d 307, 166 P. 2d 334 (1946). In the latter case deceased was a brakeman assigned to service on interstate trains. He was killed in a collision with another automobile while he was riding to work in a taxicab furnished by his employer. The accident occurred before 1939. The cab was used because other means of public transportation were not available and the occasion pertained to his employment. But the pinpoint rule did not control the case. When a railroad man is engaged in both kinds of work and is killed when he approaches the yards or the office, the interstate possibilities are dominant. That proposition was derived from the other *Winfield* case. Erie R. R. v. Winfield, 244 U. S. 170, 173 (1917). The Winfields in the two cases were not related to each other. Their employers were different and there was no connection between the events in the two cases. The proposition of the other *Winfield* case when applied to the facts in the California case left the plaintiff without a remedy. No tort could be charged to the carrier, and no compensation could be awarded under the old case law.

should be ready to reappraise *Winfield* and to think of statutory interpretation as a part of a remedial program.[60]

The Illinois Supreme Court is the only one committed squarely to the proposition that Congress in 1939 did not try to block the states' affording compensation to railroad workmen engaged in local work.[61] Obviously "local," "intrastate," or "interstate" within the definition of a statute are not simple descriptive words. They do suggest litigation, and they suggest the necessity for inquiries and appraisals. According to *Winfield* when a case fits the pinpoint transportation test of the old case law, there is no choice; the plaintiff sues in tort under the federal statute, or he has no claim for anything. And we cannot argue that Congress has disavowed that proposition. There were work injury cases before 1939 when railroad men were remediless at law. In some states, as we have seen, the legislatures had concluded that overlapping was so probable and so difficult to adjust that railroad men should be excluded from the compensation field.[62] We concede that we are talking about few instances and small percentages. We argue that workmen's compensation is good, even as it is today, and we point to the Illinois case as supporting our thesis that Congress did not intend to touch in 1939 what had been gained, perhaps inadvertently, through workmen's compensation.

Under the scheme of the Federal Act the workman in the Illinois case could have qualified as a plaintiff in a suit for damages. He was a freight-yard watchman who was attacked by thugs when he was trying to arrest a trespasser. Some of the jobs that workmen like him do pertain to the furthering of interstate commerce. But he was not engaged in interstate commerce at the time that he was hurt, even under the extended definition of the Act. Under such circumstances the Illinois court said that Congress cannot make the federal scheme effective to control a claimant's case. It was a case of local interest, the court said, which can be regulated only through state action. The thesis of the opinion is too sweeping. It is not arguable now that Congress cannot control this kind of case exclusively, but it is arguable that Congress has not chosen to do it, and that concurrent regulation is a possibility for legislators and administrators to consider. In other instances like it, plaintiffs have recovered damages under the Federal Act when they have argued from a record that a company had failed to afford adequate police protection for an employee's safety.[63] The Supreme Court has not held that in this narrow area there cannot be concurrent regulation. The Court denied a petition for a writ of certiorari to the Illinois Supreme Court.[64] It is true that petitions for writs have been denied in the other cases, also, where local courts have felt helpless before

[60] All of the cases cited in note 17, *supra*, are instances where workmen had suffered injuries arising out of and happening during their employment and where compensation was refused for reasons like those offered in the California case.

[61] Thomson v. Industrial Comm., 380 Ill. 386, 44 N. E. 2d 19 (1942).

[62] RRB SURVEY 28. See the discussion in note 51, *supra*.

[63] Lillie v. Thompson, 332 U. S. 459 (1947) (deciding, on demurrer, that plaintiff had stated a cause of action); Lillie v. Thompson, 173 F. 2d 481 (6th Cir. 1949) (remanded to trial judge to enter judgment on the plaintiff's verdict).

[64] Thomson v. Industrial Commission, 318 U. S. 755 (1943).

the arguments of carriers derived from the expanded Federal Act and the thesis of the *Winfield* case.[65] It can be argued that this denying of writs indicates that local judges do have some choice about the effect of *Winfield* after 1939.

If we must accept *Winfield* as spelling out some area of limitation on state action, and if we argue from the scheme of the 1939 revision that *Winfield* must be tied to the occasions that produced it, two alternatives are probable. There can be state as well as federal regulation in all the area of railroading outside the instances of transportation, or there can be state as well as federal regulation only when the instances occur outside the area defined as interstate within the newer statutory definitions. Under either approach we are inviting litigation over distinctions that can be artificial. Unless we accept the first alternative, however, we are letting *Winfield* and the statutory changes affect the old area of compensation.

There is merit certainly in Mr. Justice Brandeis' criticism of the *Winfield* decision.[66] Even in 1917 he would have let any injured railroader choose to litigate his case for fault or to file a claim for compensation. But there is an argument against the Brandeis thesis. Employers must be protected against crippling costs. Standardized compensation and extended liability are two ends of one remedial stick.[67] There is another argument against the Brandeis thesis, one that is perhaps more legalistic. Time and silence are on the side of *Winfield* as a potent limitation. If *Winfield* is pinned down to the case law of the old era, there will be overlapping of statutory regulations, and there will be an area where absolute liability will not be conditioned by limitations on the amounts recoverable, but the area will be minute, the cases few, and the costs trivial. The one good result from the old era can be preserved, and some few claimants can be protected. That the costs of litigation over hair-splitting distinctions can outweigh the advantages in preserving something good from the old regime is a probability that can be resolved only through the attitudes and understanding of the judges. That judges can respond to resolve probabilities like these is illustrated in the story of the *Jensen* case.

The *Winfield* case is published in the same volume of reports as the opinion in the *Jensen* case.[68] In that case the Court held that longshoremen were beyond the reach of state legislatures with compensation programs. In other cases following *Jensen* harbor workers were added to the protected class.[69] Congress did step in thereafter to afford a comprehensive compensation program for both longshoremen and harbor workers.[70] Perhaps it is easy to describe a longshoreman but it is not easy to describe the kind of harbor worker that a state legislature cannot touch.[71]

[65] Trucco v. Erie R. R., 328 U. S. 843 (1946); Albright v. Pennsylvania Co., 323 U. S. 735 (1944).

[66] 244 U. S. 154 *et seq.*

[67] *See* Pitney, J., in New York Cent. R. R. v. White, 243 U. S. 188, 202-204 (1917).

[68] *Winfield:* 244 U. S. 147; *Jensen:* 244 U. S. 205. In fact, the decisions were handed down on the same day.

[69] The word "protected" includes a touch of sarcasm. See Baizley Iron Works v. Span, 281 U. S. 222 (1930); Gonsalves v. Morse Dry Docks & Repair Co., 266 U. S. 171 (1924).

[70] The Longshoremen's and Harbor Workers' Compensation Act, 44 STAT. 1424 (1927), 33 U. S. C. §901 *et. seq.* (1946).

[71] *See* Parker v. Motor Boat Sales, 314 U. S. 244 (1941). In spite of the cases referred to in note

In some instances the person who can qualify as one is engaged by an employer who contributes to a state fund or carries insurance protection under a state program and who discovers only at the time of the event that his workman was engaged in navigation. Supposedly the problem must be solved by one answer. At the time of his injury the man was a harbor worker and subject only to the federal compensation scheme, or he was some other kind of worker whose claim must be processed under a state act. The distinctions are fine, and the decisions are administrative. In the *Davis* case the Supreme Court has recognized the possibility of concurrent control in these situations by allowing the agency, federal or state, under which a claim is first processed, to effect a final classification which will not be reviewed.[72] The Court has admitted that the effect of this decision is to afford a kind of double regulation.

There are some other cases which support the thesis of this paper. The South Carolina Supreme Court has been just as positive as the Illinois court in stating its case against exclusive regulation.[73] The judgment in the South Carolina case was trivial in amount, but the language of the court was definite in tone. The plaintiff was a railroad workman who had strained his back while he was piling bales of cotton on a railroad platform. The cotton was a part of an intrastate shipment, but this workman did handle interstate shipments also. Under the State Employers' Liability Act in this kind of case, the defense of contributory negligence was not effective even to cut down compensation. Although the plaintiff had tackled the job by himself when he should have known that he was not equal to the task, the carrier should have known that other workmen would be needed. The plaintiff sued under the state act, and judgment in his favor was affirmed in the state supreme court. The court conceded that federal regulation could be effective here, but the court said it was not exclusive. "No one questions that Congress has the power to regulate interstate commerce, and it may preempt the field, but as before indicated, we do not regard the 1939 amendment to the Federal Employers' Liability Act as excluding all state law on the subject."[74]

There are some instances where a railroad workman's case affects another carrier than the one who pays his wages. The Federal Act covers employment relations between carriers and their employees. The courts have said that "employer" means conventional employer.[75] Sometimes two carriers can qualify as conventional

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69 *supra*, there was a trend in the case law toward recognizing a doctrine of local concern. The effect of this was to permit many kinds of harbor workers to be covered under state compensation laws. *See* Miller's Underwriters v. Braud, 270 U. S. 59 (1926); Carlin Construction Company v. Heaney, 299 U. S. 41 (1936). As soon as Congress required compensation protection for harbor workers who were not covered under state acts, courts began to effect an expansive interpretation in the other direction. That trend is pointed up in the *Parker* case.

[72] Davis v. Department of Labor, 317 U. S. 249 (1942); *cf.* Occidental Ind. Co. v. Industrial Acc. Comm., 24 Cal. 2d 310, 149 P. 2d 841 (1949) (where the state court reversed an award of the local commission in favor of a local claimant who was not a harbor worker but a seaman fisherman entitled to maintenance and cure).

[73] Boyleston v. Southern Ry., 211 S. C. 232, 44 S. E. 2d 437 (1947).

[74] 211 S. C. at 242, 44 S. E. 2d at 541.

[75] Latsko v. National Carloading Corp., 192 F. 2d 905 (6th Cir. 1951); Gauldin v. Southern Pac.

employers because they share wage-paying and time-using,[76] but there are other instances where the conventional employer status is derived from the measure of a local statute. In a Missouri case the injured workman was employed by the Terminal Association in St. Louis which had leased certain of its facilities for use by the Frisco Lines.[77] The tortfeasors were employed by Frisco, and the injured plaintiff was hurt in the line of duty. The case was processed against both carriers under the federal statute. Although the plaintiff could not reach Frisco for the claim because that carrier was not the conventional one, he did reduce his claim to judgment for the tort against the Terminal Association. The court found the measure of the conventional employer's responsibility in a local statute under which a lessor railroad must respond for a lessee's torts. In an Illinois case where an engineer was employed by Gulf, Mobile & Ohio and was injured by the tort of the Terminal's men, judgments were recovered by the engineer against both carriers.[78] The Illinois court justified the double obligation by referring to a local statute like the Missouri one.

As recently as 1949 the New York Court of Appeals agreed with the many judges and said that Congress did reduce the compensation possibilities in 1939.[79] Nevertheless in 1952 that court protected a state compensation claim against a railroad carrier's attack and did it under an old state statute that was enacted before 1939.[80] The employer had paid compensation to the workman during a four-year period. After the employee died, his widow claimed compensation for the final two weeks. The carrier resisted the widow's claim and argued that the case was one which was covered exclusively under the Federal Act and that the award should never have been made in the first place. The court did not permit an inquiry into the merit of the argument. Under the state law an employer can waive its federal rights. It is significant that there had been no argument on this proposition before the state board and that the court saw no repugnance between the effect of this statute and the exclusiveness of the federal program.[81]

Co., 78 F. Supp. 651 (N. D. Calif. 1948). *Cf.* Terminal R. R. Assoc. v. Fitzjohn, 165 F. 2d 473 (8th Cir. 1948), 1 A. L. R. 2d 290 (1948): The injured crewman was not on the carrier's payroll. Although he worked in an industrial plant, he was in the company's employ. Originally he was procured through the company's personnel office and he retained his seniority on the carrier's employment roll. As an employer the railroad was responsible for the unsafe conditions in the plant.

[76] Lavender v. Kurn, 327 U. S. 645 (1946).

[77] Graham v. Thompson, 212 S. W. 2d 770 (Mo. 1948).

[78] Wilson v. Terminal R. R. Association, 333 Ill. App. 256, 77 N. E. 2d 429 (1948).

[79] Baird v. New York Cent. R. R., 299 N. Y. 213, 86 N. E. 2d 567 (1949).

[80] Ahern v. South Buffalo Ry., 303 N. Y. 545, 104 N. E. 2d 898 (1952); *cf.* Heagney v. Brooklyn Eastern Dist. Terminal, 190 F. 2d 976 (2d Cir. 1951). The claimant in the latter case was barred from suing under the Federal Act because he had processed his claim for compensation and had accepted a weekly stipend. The federal court found a waiver here comparable to a settlement of the claim. *But see* Pritt v. West Virginia Northern R. R., 132 W. Va. 184, 51 S. E. 2d 105 (1948), *cert. denied*, 336 U. S. 961 (1949). In the West Virginia case compensation had been awarded but the action of the local administrators had not been confirmed by judicial action. In West Virginia there was no statute like the New York one, and the plaintiff was not barred.

[81] There may be other isolated instances where state law measures have been used in the exclusive regulation area. One possibility is illustrated in Mooney v. Terminal R. R. Association of St. Louis [352 Mo. 245, 176 S. W. 2d 605 (1944)]. It was argued in the *Mooney* case that discoverable peril

The weight of the case law against the thesis of this paper is heavier in 1953 than it was ten years ago, but the thesis is not old enough yet to be obsolete. It can be summarized again in a few sentences. With the tight transportation test, the pinpoint rule, and the exclusive regulation doctrine of the *Winfield* case, the Supreme Court opened a small compensation area to the employees of interstate railroads. Congress did not restrict that area literally in the act of 1939. Although there was merit in Mr. Justice Brandeis' argument against the Court's exclusive regulation doctrine, the case in favor of the doctrine has depended on cost factors. If railroads have to carry two kinds of work injury programs for most of their employees, the costs of both could be unreasonable. Nevertheless, in 1939 Congress did not literally confirm, or restrict, or modify the doctrine of the *Winfield* case. Nor did Congress consider the probability of concurrent programs in any area, but Congress did plan a series of changes to extend the remedial protection of the Federal Act to more railroad personnel. Statutory interpretation demands adjustments which depend on many factors. Because Congress did not meet the issue squarely, and because the plan of the 1939 statute is expansive, it is arguable that exclusive regulation can be confined to the area carved out before 1939. Under this interpretation there will be concurrent regulation in a small area affecting a few railroad workmen. Within that area a railroad company will have to carry the costs of two kinds of work injury programs, but the cost burdens will be negligible. It is apparent that there is in this the probability of litigation, depending on inquiries and classifications, but there was that probability before 1939, and there has been some of it under the one-sided case law since 1939. That the probability can be reduced, if the courts choose to do it, is illustrated in the *Davis* case.

The argument of this paper is important for what it is, a proposal for solving a few hard cases, but it serves a function that is even more vital. That the questionable area exists at all illustrates the inadequacies of the Federal Act as a scheme of social legislation. Ours is not an ideal world. We do not try to measure the good of a socal welfare program only by the ideals of a Christian kind of charity. As we plan for social living in this world, we cannot always escape from history or self-interest. Nevertheless we can try to reach for the common good and to understand what it means for men to share social costs and benefits.

Although there are lawmen nowadays who tell us otherwise, two propositions are fundamental. The fault concept in personal injury cases is obsolete, and there is no such actuality as an adequate award.[82] Men cannot help themselves alone. They share privileges, responsibilities, and functions in an industrial society, and they share also its risks and burdens. Most of the burdens from physical hurts are absorbed by injured persons and their families. Tort costs are shared with tort-

and last clear chance are different doctrines, that one is state and the other federal, and that the judge had permitted the jury to use the state measure in the Federal-Act case. That part of the trial judge's disposition was approved although a judgment for the plaintiff was reversed on other grounds. The problem was relatively academic because under the federal statute contributory negligence can affect only the amount of damages and the jury must effect the adjustment.

[82] Good lawyers have done much to popularize the phrase "adequate award." See Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951).

feasors, employers, and insurers. Even when judgments are large some cost burdens must be absorbed by community neighbors.[83] Perhaps this kind of burden sharing cannot be translated into cost items in a casualty or compensation statistical report, but it does exist. Whether we like it or not, we have to live with social burdens derived from torts, even though we suppose naïvely that only the parties to a lawsuit are affected by the outcome, and then only as they have contributed to the events.

Reaching for alternatives to fault in the casualty field is a task lawmen must measure up to someday. The impossibilities, the second guessing, and the cruelties of the fault thesis are tempered practically by doctrines like *respondeat superior* and *res ipsa loquitur,* and by conditions like insurance risk-shifting and adminstrative measuring through the jury system. Perhaps we shall continue for many years to get along with the fictions and incongruities in this field, because alternatives are so difficult to plan and because the conditioning factors produce results that are more or less acceptable. There is, however, a practicable alternative in the work-injury field.[84] Figures and statistics notwithstanding, the case for workmen's compensation is sound. The figures and compilations suggest that compensation as we know it today may be inadequate and administration too costly. Perhaps we can learn through these statistics that litigation-type contests have no place in the administering of workmen's compensation and that common-law analogies are not helpful for compensation lawyers, but social insurance is with us for good, and lawyers must make the best of it.

We are still supposing that legislators function in the twentieth century as they did in the early eighteen hundreds, when men from many levels of life attended legislative sessions to prescribe for all of the affairs of state. Practically we know that legislators confirm often what special interest groups propose as good. Nor is that necessarily bad. Dentists, for example—and to present a wholesome illustration—should know what the standards ought to be for men in their profession. Lobbying by dentists for professional regulation is a sound routine.[85] Perhaps there is reason to suppose that sometime law-making schemes like code drafting under the old National Recovery Act may be an everyday device. Nevertheless it is sufficient here to say that we are not ready yet for industry-council kind of law-making and that Congress does not have to abdicate its functions when it accepts from railroad men the suggestions for a plan of compensation. The framework of the plan must come from people who are in the business—from workmen, clerks, executives, stockholders, and railroad lawyers. Members of the legal profession are important persons in their communities. Their advice is essential in the drafting of social legislation, but they must serve as counselors and not as advocates.

[83] We are not thinking here only of increased costs through bigger insurance premiums. The cost-sharing possibilities are more indirect and more expensive.

[84] Some persons have seen possibilities for it in the automobile field. *Compensation for Automobile Accidents: A Symposium,* 32 COL. L. REV. 785 (1932); Comment, 3 LAW & CONTEMP. PROB. 579 (1936). Cf. Saskatchewan's Automobile Accident Insurance Act of 1947 (c. 15) as amended in 1948 (c. 15) and in 1949 (c. 11), discussed by J. Green in 31 J. COMP. LEG. & INT'L L. (3d Ser., Pts. III and IV) 39 (1949).

[85] There is one such statute I know well and which I think is sound. Louisiana Acts 1940, No. 334. LA. REV. STAT. §§37: 752-790 (1950).

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